No. 08-

IN THE

Supreme Court of the United States

DIANE B. WEISSBURG,

Petitioner,

v.

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION, LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an employee permitted to refuse Family and Medical Leave Act ("FMLA") designation under 29 U.S.C. §§ 2615(a)(1), 2615(a)(2). If so, is such a designation in order to prevent the employee from getting paid, over the employee's written objections actionable?

2. Whether an employer can count the time due to a work-related injury, against the employee's 12 weeks of FMLA leave allowed by 29 U.S.C. § 2612(a)(1) over the employee's written objection?

3. Is there a conflict between an Employee's due process rights to refuse FMLA Leave designation when it is used in retaliation to prevent the employee from getting paid and the employers designation based on the ambiguities in the statutes?

   a. The Federal FMLA statute states "the employee's FMLA 12-week leave entitlement **may** run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition."

   The California Family Leave Act ("CFLA") statute states, "CFRA does not impact applicable workers' compensation laws, but permits an employer to count industrial disability leave periods as CFRA leave. Therefore, when the work-related injury is a '"serious health condition,' the employer **may** charge the leave period against the employee's 12-workweek CFRA entitlement".

4. Whether a reviewing court with the knowledge that there is an absence of a complete and authentic agency record due to no fault of the Appellant, violates Appellant's due process rights by, 1) ignoring the fact that they do not have the complete and accurate record to render a decision, and 2) make a decision without that complete and accurate record anyway?

5. Is the due process clause violated when a direct conflict of interest is created where the Los Angeles County Office of the County Counsel provides legal advise on a race discrimination and retaliation matter, at the same time to: 1) Los Angeles County Civil Service Commission ("Commission"); 2) Civil Service Hearing Officer ("HO"); and 3) Los Angeles County Department of Children and Family Services ("DCFS"), the Real Party in Interest.

6. Whether it is proper for a reviewing court, presented with a properly set-up petition for review, to allow the non-participation of the named respondent (whose injurious adjudicatory process is at issue) by substituting said named respondent with an Intervenor (who is alleged to be the discriminator/retaliator) without incurring violation of the due process clause?

7. Whether Petitioner's due process rights were violated because the standard for review which concerns validity of the administrative proceedings and presents a pure question of law involving the application of the due process clause on questions of law mandates a "de novo review" at the Appellate level; the Appellate Court used the "substantial evidence test"?

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LOS ANGELES COUNTY CHARTER

Petitioner Diane Weissburg respectfully petitions this Court for a Writ of Certiorari to review the judgment and Opinion of the California Court of Appeal.

OPINIONS BELOW

The Civil Service Commission Findings, Superior Court Writ Decision, and Court of Appeals Decision are not reported. The California Supreme Court denied Review on November 12, 2008.

JURISDICTION

This Petition has been filed within ninety days of the opinion below; this Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fourteenth Amendment to the United States Constitution, section 1 specifies:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent provisions of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2612(a)(1), is as follows:

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the function of the position of such employee.

29 U.S.C. § 2615(a)(1) provides:

> ("interference provision") prohibits an employer from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided under [the Act]; and

29 U.S.C. § 2615(a)(2) provides:

> ("discrimination provision") prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful under [the Act].

29 C.F.R. § 825.207(e) states:

> The Act provides that a serious health condition may result from injury to the employee **"on or off"** the job. ***If*** the employer designates the leave as FMLA leave in accordance with § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers'

> compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job." As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave.

The pertinent provisions of the California Family Rights Act ("CFRA") are as follows:

California Government Code § 12945.2(a) provides:

> Except as provided in subdivision (b), it shall be an unlawful employment practice for any employer, as defined in paragraph (2) of subdivision (c), to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested

pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave. The commission shall adopt a regulation specifying the elements of a reasonable request.

(c) or purposes of this section:

* * *

(3) "Family care and medical leave" means any of the following:

(C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions. Serious health condition means illness, injury (**including on-the-job injuries**), impairment, or physical or mental condition of the employee or a child, parent or spouse of the employee that involves either:

In-patient care (i.e., an overnight stay) in a hospital, hospice, or residential health care facility; and

Continuing treatment or supervision by a health care provider.

California Government Code § 12945.2(a),(c)(3)(C), states,

> A covered employee is entitled to leave because of a serious health condition that makes the employee unable to perform his or her job functions.
>
> (3) "Family care and medical leave" means any of the following:
>
> * * *
>
> (C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.
>
> (4) "Employment in the same or a comparable position" means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave.

California Government Code § 12945.2(c)(8) provides:

> "Serious Health Condition" means: An illness, injury, impairment or physical or mental condition that involves either:

> Inpatient care in a hospital, hospice, or residential facility, or
>
> Continuing treatment or supervision by a healthcare provider [CFRA], continuing treatment by a healthcare provider.

Title 2, California Code of Regulations §7297.0, states:

> "(o) "Serious health condition" means an illness, injury (including on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent or spouse of the employee which involves either:
>
> (1) inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential health care facility, or
>
> (2) continuing treatment or continuing supervision by a health care provider, as detailed in FMLA and its implementing regulations.

The pertinent provision of the Los Angeles County Code is as follows:

Los Angeles County Code §6.09.070, states:

> Other absences:
>
> * * *

C. Less Than Full-Day Absences. A Salaried Employee who is absent for less than a Full Day shall not suffer a reduction in pay except where such unpaid absences are taken in accordance with The Family and Medical Leave Act regulations. (Ord. 2004-0040 § 6, 2004: Ord. 93-0019 § 5 (part), 1993.)

STATEMENT

The Decisions of the Los Angeles County Civil Service Commission; Superior Court Decision and the Court of Appeals Decision, all of which addressed different areas below, gives license to the County of Los Angeles to retaliate against their employees for exercising protected rights and turns existing principles of due process, FMLA rights, CFRA rights and Fair Hearings upside down by invoking FMLA against a Management employee to prevent that individual from getting paid five days after the employee filed a claim of Race Discrimination. This decision creates a dangerous president in which the outcome of the proceeding determines the fairness of the process instead of whether the fairness of the process determines whether the outcome is just.

This case squarely presents a recurring constitutional question that is dividing the lower Federal courts, has not been addressed in the California courts and has not been-but should be resolved by this Court.

1. Under Section 1 of the Fourteenth Amendment, States are prohibited from intentionally discriminating on the basis of gender unless such discrimination is

substantially related to the achievement of an important governmental interest. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142,150 (1980). Under Section 5 of the Amendment, Congress is permitted to enact "appropriate" legislation to "enforce" Section 1, but there must be "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

2. In enacting the FMLA, Congress purported to be "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . on a gender-neutral basis." 29 U.S.C. § 2601(b)(4). To that end, it required all employers to provide every employee twelve weeks of leave (A) "[b]ecause of the birth of a son or daughter . . . . (B) [b]ecause of the placement of a son or daughter with the employee for adoption or foster care[;] (C) [i]n order to care for the spouse, or a son, daughter, or parent, of the employee . . . . [or] (D) [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1).

3. This case concerns the FMLA's fourth leave provision, § 2612(a)(1)(D), which allows employees to take 12 weeks of leave because of a serious health condition; However, this case is about the right of an employee to **refuse** FMLA Leave designation, 29 U.S.C. 2615(a)(2), and California Government Code § 12945.2(a), (c)(3)(C). Further, if such designation is

imposed over the employee's written objection, is that interference with the employee's FMLA rights? If so, is that actionable against the employer under 29 U.S.C. § 2615(a)(1) or 2615(a)(2).

4. This case arises from the unjustified and over the written objections of Petitioner, Diane B. Weissburg ("Weissburg"), invocation of FMLA Leave designation. Weissburg asserts that her employer made that designation in retaliation for Weissburg filing a claim of Race Discrimination against her employer DCFS. That designation was made to prevent Weissburg from getting paid, not because she had a qualifying medical condition. In fact, Weissburg's own physician wrote that Weissburg did not have a qualifying medical condition.

DCFS issued forms that FMLA was invoked anyway and refused to authorize pay to Weissburg. In their briefs, DCFS denies that FMLA was imposed. DCFS' own memos and forms negate its denial(s). The Hearing Officer said Weissburg had not been paid correctly and DCFS should pay her, but that while Weissburg and DCFS were imposed, because Weissburg would not sign a form, FMLA was not actually invoked. DCFS never paid appellant as the hearing officer recommended. The appellate court never addressed the issue. However, in *Burlington Northern* this Court stated: "It is the threat by the employer against the employee that counts and 30-days without a paycheck would be a hardship on any employee". *Burlington* at 526. In this case Weissburg was threatened regarding her pay and then again with a denial of a transfer to a day shift, unless she dropped her retaliation claims. The appellate court never addresses these issues raised in Weissburg's briefs and the decision of the lower court should be reversed.

Five days after filing and being granted a claim of Race Discrimination with the Commission against her employer; DCFS, placed Weissburg on a non-existent Friday-Monday 11:00P.M. To 9:00A.M, graveyard shift in retaliation for making that claim.

Weissburg worked two weeks of the punitive graveyard shift pending a Commission hearing. On October 24, 2005 Weissburg collapsed from sleep deprivation. She was ordered by her physician to work between the hours of 6:00 a.m. and 6:00 p.m. only, and no other restriction. No one has ever been hired to replace Weissburg on that shift, which never previously or currently exists.

5. On November 1, 2005, Weissburg was informed that DCFS intended to initiate FMLA paperwork on her behalf. She rejected DCFS' assertion that her condition qualified her for FMLA leave, and provided a second letter from her physician which both confirmed that her condition did not qualify for FMLA leave and that Weissburg was able to perform her job duties as an ARA provided that Weissburg work a day shift which she had done for 23 years. Weissburg never applied for, and explicitly refused FMLA Leave designation in writing.

Federal case law mandates in the 8th Circuit states that an employee has the right to refuse FMLA designation. *Sanders v May Dep't Stores*, 315 F.3d 940, 946 (8th Cir. 2003) The Court stated, under 29 C.F.R. §825.301(c), a detailed employer written notice obligation arises only after an employee gives sufficient information to the employer to apprize it of the need

for leave due to a serious health condition. If an employee gives insufficient or no notice of a serious health condition, 29 C.F.R. § 825.301(c) does not apply. If an employee fails to properly notify her employer of her need for leave, the employer would be under no obligation to comply with the requirements of § 825.301(c). *Sanders*, *supra*, at 945. There is no legal requirement that an employer must give an employee FMLA leave after such an offer has been rejected. *Id.* at 946.

In *Rodgers v. Union Pac. R.R. Co.*, 2006 U.S. Dist. LEXIS 15297 (W.D. Wash. Mar. 13, 2006), a 9th Circuit District Court held, "The federal courts have recognized that 29 U.S.C. § 2615(a) creates two types of claims: "interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, and retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act." *Strickland v. Water Works and Sewer Bd. of the City of Birmingham*, 239 F.3d 1199, 1206 (11th Cir. 2001). In the case at bar, DCFS did both acts.

6. Weissburg is a White female employed by Respondent DCFS as an Assistant Regional Administrator ("ARA"). She is a 24 years of service, permanent full-time salaried County manager in the classified Civil Service; her job performance was reviewed at that time under the Management Appraisal and Performance Plan ("MAPP"). She is afforded all rights and protections guaranteed under the Civil Service System. As a Manager, if Weissburg works less

than a full day, she is paid for the entire day, unless FMLA is designated.

In Weissburg's case her physician specifically specified that this was not a FMLA qualifying event. As in Brock where the Court stated; "there was issue of fact as to whether employee suffered from depression as chronic serious health condition, and whether employer considered Family and Medical Leave Act (FMLA), 29 U.S.C.S. §§ 2601 et seq. qualifying leave as basis for disciplinary action, thus interfering with employee's FMLA rights. *Brock v United Grinding Techs., Inc.* (2003, SD Ohio) 257 F Supp 2d 1089. Defendants in Weissburg's case deliberately interfered with Weissburg to prevent her from getting paid.

Further, this was a work-related injury due to imposition of a retaliatory transfer to a non-existent all weekend graveyard shift. This raises the additional issue of whether, over employees' written objection, an employer under California's Family Rights Act ("CFRA") can still count against the employee's 12 weeks of leave allowed by 29 U.S.C. § 2612(a)(1), due to a work-related injury which would then interfere with a scheduled or emergency family leave.

While an employer was entitled to count employee's workers' compensation as leave toward her annual Family and Medical Leave Act allotment where employee was specifically notified that such was employer's practice; it was not necessary that such policy be laid out in employer's handbook. *Dortman v ACO Hardware, Inc.* (2005, ED Mich) 405 F Supp 2d 812, in this case Weissburg was never notified of that practice until after FMLA was invoked.

7. At the conclusion of a 10-day Civil Service Hearing, the Hearing Officer ruled that even though DCFS invoked FMLA against Weissburg, there was no financial detriment. Weissburg was told she had to use her own time on the books to be paid or go without pay. DCFS decided to pay Weissburg without her knowledge and restored all of Weissburg's time during the hearing. (Appendix D, pg., 37a, no. 5.) The Commission further ruled that while all of the allegations were true, there was not a causal link to the protected activity. This ruling was based on one employee stating she did not know about Weissburg's discrimination claim, at the time Weissburg was ordered to an all-weekend graveyard shift. However, the employer always knew as they appeared at all hearings. (Appendix E, pgs. 2735-82a.) The Commission denied Weissburg relief. (Appendix C, pg. 29-30a.)

8. Weissburg petitioned the Commission for re-hearing based on the decision of this court in, *Burlington Northern & Santa Fe Ry. v. White* (2006), 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345. That petition was granted and the Commission remanded the matter back to the Hearing Officer in light of this court's recent decision in *Burlington Northern.*

In the second decision, the Hearing officer ruled that, FMLA was imposed against Weissburg. However, by refusing to sign a "form", unbeknownst to Weissburg and her employer; she effectively blocked the actual imposition because a payroll clerk did not have a form. (Appendix D, pg. 31-34a). The Commission never addressed the issue of an employees' right to refuse FMLA designation; the threat of that imposition in

retaliation; and/or if that would constitute interference if that imposition was over the employee's written objections.

Further, the Commission never addressed the denial of Petitioner's due process rights by refusing to enforce their own subpoenas and subpoenas dues tecum. Throughout a 10-day hearing, Petitioner demanded at every hearing, that DCFS' willful failure to produce subpoenaed documents and/or witnesses was a violation of Weissburg's due process rights. Further, that the Hearing Officer take DCFS' non-compliance of producing documents and witnesses to the full Commission as required by the Civil Service Rules and issue sanctions for their refusal to comply with the Hearing Officer's orders. The Hearing Officer never brought the matter to the full Commission and never issued sanctions. Weissburg was denied due process of law as a direct result of that failure.

9. Weissburg was told by the Hearing Officer throughout that hearing, because of California's One Final Judgment Rule, she had to wait for a final decision by the Commission, to take a Writ regarding the failure to enforce the subpoenas and subpoenas duces tecum.

10. Weissburg filed a Writ to the Superior Court, County of Los Angeles. The Superior Court ruled that Weissburg suffered no damage because she refused to sign a form, thus blocking the use of her own time. (Appendix B, pg. 27a.) The Superior Court never addressed an employees' right to refuse FMLA designation; the threat of that imposition in retaliation; and/or if that would constitute interference if that imposition was over the employee's written objections.

Further, the Superior Court ruled that Weissburg should have taken a Writ to the Superior Court to enforce those subpoenas and subpoenas dues tecum, while the Hearing was in progress. (Appendix B, pg. 27-28a.) However, as this court will see infra, that ruling is contradictory to California's One Final Judgment Rule, as well as other Court holdings requiring, "Petitioner must wait until the Commission matter is final for all purposes, to Writ the decision to a Superior Court".

11. Weissburg filed an appeal with the Second District Court of Appeals for the State of California. That court never addressed the FMLA issues at all, although those issues were briefed. (Appendix A, pg. 1-17a) As for the denial of due process, the Appellate Court ruled that the Hearing Officer "**may**" report that matter to the Commission. That ruling conflicts with Los Angeles County **Civil Service Rule** 5.20, which mandates that the Hearing Officer "**shall**" file a written report to the Commission describing the behavior and action taken."

12. As a result of subpoena problems and subpoena dues tecum in another hearing, during the pendency of that second hearing, Weissburg filed a Writ to the Superior Court; That Superior Court ruled in the second action that Weissburg's Writ was not ripe, as there was not a full and final judgment. Further, that Weissburg had to wait for a final judgment, lose; and then take a Writ to the Superior Court.

13. As a result of the conflicting Superior Court rulings on enforcement of the subpoenas and subpoena dues tecum, Weissburg filed a timely petition for re-

hearing with the Second District Court of Appeals, Division Three. That petition for re-hearing was denied. (Appendix F, pg. 83a.)

14. Finally, Weissburg filed a Petition for a Writ of Certiorari with the California Supreme Court. That Petition for Review was denied on November 12, 2008. (Appendix G, pg. 84a.)

15. There is a lack of adequate procedures and a conflict in the Courts for enforcement of subpoenas and/or subpoena dues tecum, in California's civil service or merit system employment systems. That lack of uniform procedures interferes with the procedural due process rights of all government employees.

16. This case involves important questions of law, potentially affecting not just the thousands of Los Angeles County employees governed by the Los Angeles Civil Service Rules; but the thousands of other public agencies with civil service or merit system employment systems, who are retaliated against for exercising protected activities.

A significant procedural due process case was decided by the Supreme Court in *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Due Process Clause encompasses a guarantee of fair procedure, and when state action deprives an individual of a constitutionally protected interest in "life, liberty, or property", that state deprivation is unconstitutional. See also *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). "Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property". *See Carey v. Piphus*, 435 U.S. 247, 259 (1978).

REASONS FOR GRANTING THE PETITION

A. EMPLOYEES HAVE THE RIGHT TO REFUSE A FMLA DESIGNATION; INTERFERENCE WITH THAT RIGHT IS ACTIONABLE UNDER 29 U.S.C. § 2615(a).

In order to invoke the protections of FMLA, an employee must notify his employer of his intention to take leave. 29 U.S.C. § 2612(e)(2)(B). At a minimum, an employee must give at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. 29 C.F.R. § 825.302(c). While the employee does not have to mention FMLA by name, he or she has an affirmative duty to indicate both the need and the reason for the leave. 29 C.F.R. § 825.302(c), *Sanders v. May Dep't Stores Co.*, 315 F.3d 940, 944 (8th Cir. 2003). Weissburg did not invoke the protections of FMLA and specifically rejected those protections. Those protections in Weissburg's care were unnecessary. Weissburg was ready, willing and able to work; The only requirement for Weissburg was that she had to work a day shift, as she had done for Twenty-three years. Weissburg also knew she would need that FMLA designation for a family member in the very near future.

Review of the appellate court's decision in this instance is necessary to settle important questions of law of constitutional dimensions regarding the right of an employee to refuse FMLA designation, 29 U.S.C. §§ 2615(a)(1); and 2615(a)(1). In Weissburg's case when DCFS invoked that designation it was in retaliation to prevent Weissburg from getting paid; It is necessary to protect those employees who are courageous enough to

report discrimination, harassment and retaliation in the workplace, to ensure the employee is protected by due process of law and the protected rights of government employees; to clarify the requirement that the administrative agency Commission and not the employee, is required to enforce Commission subpoenas and subpoena dues tecum in compliance with due process clause of the U.S. Constitution. Finally, an employee's right to refuse FMLA/CFRA designation and payment issues were not resolved by the federal courts; is conflicting and has not been addressed in the California State courts.

B. THERE IS NO MECHANISM FOR GOVERNMENT EMPLOYEES TO ENFORCE SUBPOENAS OR SUBPOENAS DUES TACUM IN THE CALIFORNIA CIVIL SERVICE SYSTEM, WHICH RESULTS IN DENIAL OF THE EMPLOYEE'S DUE PROCESS RIGHTS.

In Weissburg's case, the Court of Appeals erred when it did not address the denial of due process and direct conflict of interest merits of the case before the Court; the appellate court failed to do its legal responsibility, obligation, and ultimate duty of following the due process of law requirements in adjudicating the case when they decided that the word "**SHALL**" can become "**does not have to**", and the effect of that appellate decision precludes a forum or remedy for government employees.

The appellate court recognized that the California Civil Service Rules allow for subpoenas, and subpoena dues tecum. They recognized that Weissburg had

lawfully served on DCFS subpoenas and subpoena dues tecum and that DCFS never complied with those subpoenas. However the appellate court never addressed the issue of the failure of enforcement of those subpoenas by the issuing agency. The Hearing Officer denied all of DCFS' motions to quash those subpoenas; formally warned DCFS to produce the documents; then did nothing. Only on one occasion in nine months did the Hearing Officer find that DCFS' outside counsel acted in good faith to try to obtain the documents from their client. The Hearing Officer never found that DCFS acted in good faith, in their refusal to produce the documents. In fact, DCFS never produced the documents, admitted to shedding the documents, and then neither the Hearing Officer nor the Commission would enforce their own subpoenas in response to Weissburg's demands for relief.

The Appellate Court then ruled the Hearing Officer did not have to refer the matter to the Commission. That ruling is a direct contradiction to Civil Service Rule 5.21 which states:

> If the conduct of an advocate or counsel is in violation of Rule 5.20, the Hearing Officer, at his discretion, may formally warn the offender or suspend the hearing. In either case, the Hearing Officer ***shall file a written report to the Civil Service Commission*** describing the behavior and action taken.

Italics added.

In this case the Hearing Officer did warn DCFS; then failed to refer that matter to the full Commission. When DCFS tied to extort Weissburg into dropping her retaliation claim for a move to another office and a day shift; the Hearing Officer refused to refer that matter to the full Commission. Finally, the Hearing Officer did not file a written report with the Commission.

At every hearing, Weissburg demanded that DCFS' failure to produce records after repeatedly being ordered to produce those records by the Hearing Officer constituted denial of Weissburg's due process rights. Further, that the issue needed to be referred to the full Commission and the Hearing Office had an absolute duty to file a written report to the Commission. The Hearing Officers failure to do so precludes a forum, until the damage is done. That failure leaves appellant without ever having a remedy for denial of due process rights during the hearing or after they lose. That final result would require employees to utilize the courts in every due process denial case. That position would defeat the entire purpose of the Civil Service system.

The California Government Code mandates that it is the Commission's duty to enforce their own rules as well as to enforce their own subpoenas as outlined in California Government Code § 11187. The Appellate Court's ruling is clearly in error when they found the misconduct of DCFS in refusing to comply with subpoenas and shredding of documents, the Commission, and the failure of the Superior Court to rule that the Commission must enforce their own subpoenas. The order from the Superior Court that Weissburg not the Commission had the duty to enforce

those subpoenas, clearly prejudiced Weissburg and denied her due process of the law.

Then in a subsequent hearing a different California Superior Court ruled that Weissburg had to wait until the conclusion of the Civil Service matter, lose and then bring the matter of the Subpoenas and/or subpoena dues tecum, to the Superior Court. Weissburg immediately filed a request for rehearing with the Second District Court of Appeals based on the **CONFLICT** between the Superior Court decisions and the confusion with the requirements for enforcement of subpoenas in civil service hearings. That request was denied.

Therefore, the Appellate Court never got to the issue of their error regarding the causal link. The Hearing Officer ruled that all of the events Weissburg described in the 10-day hearing had occurred but could not find a causal link 5-days later. However, the *Burlington Northern* decision issued in 2006 *after* the Hearing Officer's first decision, clearly states they favor finding liability when the employer knew or should have known of the retaliation. There is no question in this case that the Employer always knew, because they appeared at every hearing. The appellate court does not address the second decision in light of the Burlington decision, by the same hearing officer or the employer's knowledge.

C. DUE PROCESS VIOLATIONS OCCUR WHEN IMPORTANT PARTS OF THE RECORD ARE MISSING DUE TO NO FAULT OF THE PETITIONER.

The Commission failed to send the entire record to the Superior Court and the Court of Appeals; The Office of the County Counsel interfered with the records; the Hearings; the Hearing Officer; and the Appeal Denying Weissburg due process of law.

The appellate court's Opinion recognized that the Civil Service Commission failed to send the entire record to the superior court. However, the appellate court then acknowledged that the Respondent Commission did not file a brief in this appeal and never addressed their failure to produce the entire record. An opposition was filed by another representative from the Office of the County Counsel for the Respondent DCFS. (RESPONDENT COUNTY OF LOS ANGELES and LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES and are hereinafter, collectively, the "County.")

But the appellate court did not address three crucial issues: First, respondent DCFS admitted to shredding the documents. Weissburg could not address the missing documents that prejudiced her if she never had access to them, for the Office of the County Counsel's controlled the documents both for the Commission and DCFS and then failed to turn those documents over to Weissburg on two separate occasions.

Second, this is the very same Office of County Counsel that Weissburg declared a conflict of interest with on the first day of hearing with the Commission in 2005; objected to any participation by that office in any of the proceedings; and objected to any representative from the Office of County Counsel participating in the appeal.

Third, a direct conflict of interest was created when County Counsel provided legal advice in any Commission ("Commission") matter involving discrimination, retaliation and harassment claims against the County, who employs both the petitioning employee and the representatives from the Office of the County Counsel.

There is no question that Weissburg ordered the entire administrative record. There is also no question that the Commission did not send the entire record; then provided no explanation for their failure to produce it. Instead the same Office of the County Counsel who represents DCFS that the Appellate Court alleges is neutral, wrote declarations for the Hearing Officer and Commission staff to explain what the documents might be. There is no wall separating the Office of the County Counsel and that dual role provides a clear basis for reversal.

D. THE APPELLATE COURT APPLIED THE WRONG LEGAL STANDARD.

Petitioner's request for **de novo review** of the claims was ignored and the Appellate Court applied the wrong legal standard resulting in denial of Appellant's Due Process rights and should be reversed.

The appellate court utilized the substantial evidence test not a "de novo review" as they were required to do. Specifically, in issues concerning validity of the administrative proceedings and present "a pure question of law" involving the application of the due process clause, we review the trial court's decision de novo. [Citation.] "... Further, to the extent we are called upon to interpret statutes or rules dealing with employment of public employees, such issues involve pure questions of law which we resolve de novo. [Citation.]" *Bostean v. Los Angeles Unified School District* (1998) 63 Cal. App. 4th 95, 107 108 (internal quotations omitted). The case before this court involved interpretation of Civil Service Rules and the requirements of Commission legal mandates as to their own subpoenas.

This case dealt with employment of a public employee and involved pure questions of law regarding failure of adequate due process principals, the right to refuse a FMLA Leave designation and the inability of government employees to enforce Civil Service subpoenas. The appellate courts review was in error, that review should have been de novo and should be reversed.

E. A CONFLICT OF INTEREST IS CREATED WHERE THE OFFICE OF THE LOS ANGELES COUNTY COUNSEL ADVISES THE REAL PARTY IN INTEREST; THE LOS ANGELES COUNTY CIVIL SERVICE COMMISSION; AND THE HEARING OFFICER IN DISCRIMINATION AND RETALIATION MATTERS.

The Office of the County Counsel, a very interested party, told the Commission that they did not have the authority to issue a "Stay", of an adverse punitive transfer of Weissburg for reporting race discrimination in Los Angeles County. The Commission never decided if it would issue the equitable relief itself;. That same County Counsel then advised DCFS, Real Party In Interest; the Hearing Officer who is employed by the Commission to conduct and decide Weissburg's Discrimination and Retaliation Hearing; the Commission members as well as their staff; and the Appellate Court regarding the destroyed and missing records.

Weissburg objected to County Counsel's representation of the Commission at the first hearing on her discrimination claims and at all subsequent hearings. There is a direct conflict of interest; and there is no question that the Office of the County Counsel is a very interested party in the outcome of Weissburg's claims. Ruling that the Commission does not have all of the implied powers necessary to enforce and protect its jurisdiction; and to issue equitable relief; defeats the entire purpose of the Commission, including the need for swift justice; such a ruling will require all County employees to file all future actions in the courts instead of utilizing the Civil Service System.

Los Angeles County Charter, §30 clearly defines the Commission's purpose:

> The purpose of this article is to establish a Civil Service System for the classified service, which shall provide County government with a productive, efficient, stable, and representative work force by:
>
> . . .
>
> (3) Assuring fair treatment of applicants and employees in all aspects of personnel administration without discrimination based on political affiliation, race, color, national origin, sex, religious creed or handicap and with proper regard for their privacy and constitutional rights as citizens.

Id.

It is beyond dispute that those who created the Commission did not intend it to create an impotent agency.

Further, the Office of the County Counsel interfered again when they advised DCFS, the Commission staff, and the Hearing Officer regarding the missing records. The Office of the County Counsel interfered again when they refused Weissburg's request for the records that are supposed to be controlled by neutral Commission staff. Two weeks later, after Weissburg filed her opening brief, they offered to provided their version of sanitized copies of the records.

Review is necessary as the Office of the County Counsel creates a direct conflict of interest when rendering legal opinions in discrimination and retaliation matters before the Commission; that conflict must be resolved.

The more-insidious result is the clear signal that shall be sent to employees contemplating bringing their own claims: When the claims are brought the employer will penalize the claimants by invoking punitive changes in assignments and/or working conditions, as documented in the August 9, 2006 *La Opinion* article. This article is about employees of DCFS who wrote a letter to the Board of Supervisors clearly stating that "they are afraid of retaliation if they go public about discrimination in DCFS; "what happened to Weissburg will also happen to them." Consequently employees will not bring their discrimination and retaliation claims to the Commission because they will know two certainties – after merits hearings are ordered in their cases the employees will face an onslaught of punitive job actions, and the Commission will not stay such job actions because of unlawful interference by the Office of the County Counsel.

CONCLUSION

By undertaking review of these matters and settling the issues hereby presented this Court will provide local governments and courts with much needed guidance in this important and growing area of public interest.

For the reasons stated above, it is requested that this Court grant review to consider important questions of law raised in this petition regarding the right of an employee to refuse a FMLA designation; If so, is that interference under the Statute; the due process rights of government employees to enforce subpoenas as well as the standard on review by the appellate court in light of the *Burlington Northern* decision; and the conflict that is created when the Office of the County Counsel deliberately interferes with the due process rights of government employees.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE FILED SEPTEMBER 9, 2008

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE

No. B201432

(Los Angeles County Super. Ct. No. BS105855)

DIANE B. WEISSBURG,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION,

Defendant and Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest and Respondent.

Diane B. Weissburg appeals a judgment denying her petition for a writ of mandate against the Civil Service Commission (Commission) of the County of Los Angeles.

She challenges the Commission's denial of her claims for employment discrimination and retaliation. She contends (1) the Commission and its hearing officer denied her due process and a fair hearing and prejudicially abused their discretion by failing to enforce her subpoenas for records, (2) the evidence compels the conclusion that the Department changed her working hours in retaliation for her discrimination claim, (3) the administrative record before the trial court was incomplete, and (4) the county counsel's representation of her employer, the Los Angeles County Department of Children and Family Services (Department), while providing legal advice to the Commission was an impermissible conflict of interest. We conclude that she has shown no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Administrative Proceedings*

Weissburg is an Assistant Regional Administrator for the Department. She applied for a promotion to the position of Regional Administrator, but she did not receive the promotion and another candidate was selected. She filed a claim with the Commission on July 27, 2005, alleging that she was denied the promotion because she was white. On September 21, 2005, the Commission granted her a hearing. On September 26, 2005, she received notice that her work hours had been changed from the day shift to a new overnight shift. She filed a second claim with the Commission on September 28, 2005, alleging that her work hours were changed in

retaliation for her prior claim. The Commission granted her request for a hearing on her second claim.

Weissburg experienced health problems shortly after she began working the overnight shift, and applied for a medical hardship transfer to a daytime position. The Department instead granted her medical leave under the Family Medical Leave Act, although she had not requested medical leave. She was never actually placed on leave, but was reassigned to a day shift. She filed a third claim with the Commission on November 8, 2005, alleging that she was placed on medical leave involuntarily in retaliation for her prior claims. The Commission granted her request for a hearing on her third claim.

A hearing on the three claims was conducted before a hearing officer for several days in November 2005 and February to April 2006. Weissburg served numerous subpoenas for records on the Department. The Department and the Los Angeles County Department of Human Resources made motions to quash and motions for protective orders relating to the subpoenas. The hearing officer denied the motions. Weissburg complained to the hearing officer several times that the Department had failed to comply with the subpoenas. The hearing officer directed the Department to determine whether there were any further responsive documents in several categories and, if so, to produce them. The Department produced further documents. Weissburg moved to exclude evidence that was not timely produced and for sanctions. The hearing officer denied the motions.

Appendix A

The hearing officer issued a report and recommendation on June 16, 2006. She found that the selection process was not discriminatory based on race and that the denial of a promotion was nondiscriminatory. She also found that there was no causal connection between Weissburg's discrimination claim and the change in her working hours because there was no evidence that the decision maker, Jennifer Lopez, was aware of the claim at the time of the decision. The hearing officer also concluded that the shift change was not an act of retaliation. She further found that there was no improper motive in the Department's approval of medical leave and that Weissburg suffered no damage as a result because she was never actually placed on leave and continued to be paid for her regular daytime working hours. The hearing officer therefore recommended the denial of Weissburg's claims.

The Commission adopted the hearing officer's findings and recommendation and denied the claims in October 2006.

2. *Trial Court Proceedings*

Weissburg filed a verified petition for writ of mandate in the trial court in October 2006. She alleges in her first amended verified petition filed in April 2007 that the commission's decision is not supported by the evidence, that the hearing officer's and the Commission's failure to enforce her subpoenas against the Department was a denial of due process, and that the county counsel's representation of the Department

while providing legal advice to the Commission was an impermissible conflict of interest. After a hearing on the merits, the trial court issued a written ruling.

The trial court applied the independent judgment standard in reviewing the Commission's decision. The court concluded that the denial of a promotion was not discriminatory based on race, that there was no causal connection between Weissburg's discrimination claim and the change in her work hours, and that she suffered no damage as a result of the medical leave approval because she was never actually placed on medical leave. The court therefore concluded that the evidence supported the Commission's decision. The court concluded further that Weissburg never sought judicial enforcement of her subpoenas during the administrative proceedings and failed to show any infringement of her right to present evidence or to cross-examine witnesses, and that she therefore failed to establish a due process violation. The court entered a judgment denying the petition in July 2007. Weissburg timely appealed the judgment.[1]

3. *Subsequent Events*

Weissburg visited the Commission's offices in February 2008 to obtain a copy of a document that she was aware of but was not included in the certified

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1. We construe the notice of appeal from the order denying the petition as an appeal from the judgment subsequently entered. (Cal. Rules of Court, rule 8.104(e).)

administrative record. At that time, a Commission employee located a box of documents related to her claims. Weissburg looked through the box, found the document that she was looking for, and arranged to return the next day to obtain copies of the other documents in the box. When she returned the next day, Weissburg was told that the county counsel had advised the Commission not to produce the documents to her. A Commission employee also refused her request to provide a list of the documents in the box. The Commission later determined that the box contained only copies of documents from Weissburg's file and the hearing officer's working papers and, approximately two weeks after she had visited the Commission's offices, informed her by voicemail and letter that she could pick up a copy of the documents. Weissburg has failed to do so.

CONTENTIONS

Weissburg contends (1) the hearing officer and the Commission denied her due process and a fair hearing and failed to comply with the Commission's own procedural rules by failing to enforce her subpoenas for records; (2) the evidence compels the conclusion that the Department changed her working hours in retaliation for her discrimination claim; (3) the administrative record before the trial court was incomplete; and (4) the county counsel's representation of the Department while providing legal advice to the Commission was an impermissible conflict of interest.

Appendix A

DISCUSSION

1. *Standard of Review*

Code of Civil Procedure section 1094.5 governs judicial review of a final decision by an administrative agency if the law required a hearing, the taking of evidence, and the discretionary determination of facts by the agency. (*Id.*, subd. (a).) The petitioner must show that the agency acted without or in excess of jurisdiction, did not afford a fair trial, or prejudicially abused its discretion. (*Id.*, subd. (b).) An abuse of discretion is shown if the agency did not proceed in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (*Ibid.*) "[I]n cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (*Id.*, subd. (c).) Regardless of whether the trial court properly reviews the agency's factual findings under the substantial evidence test or exercises its independent judgment on the evidence, the appellate court reviews the factual findings by the trial court under the substantial evidence test. (*Fukuda v. County of Los Angeles* (1999) 20 Cal.4th 805, 824.)

On appeal, we independently determine whether the agency afforded a fair administrative hearing and whether the agency prejudicially abused its discretion by failing to proceed in the manner required by law. (*Environmental Protection & Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 87; see 2 Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed.2008) § 16.50, p. 638.) In so doing, we defer to the express or implied factual findings by the trial court if they are supported by substantial evidence. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.)

2. *Weissburg Has Not Shown that the Commission Denied Her a Fair Hearing or Failed to Comply with its own Procedural Rules*

Rule 5.21(c) of the Civil Service Procedural Rules adopted by the Commission authorizes the hearing officer to suspend the hearing if a witness refuses to testify or to recommend that the Commission ask the county counsel to seek an order from the superior court directing the witness to cooperate.[2] Rule 5.21 also

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2. "If a witness refuses to testify, or his conduct is in violation of Rule 5.20, the Hearing Officer may suspend the hearing. Upon recommendation of the Hearing Officer, the Civil Service Commission may request the County Counsel to obtain an order from the Superior Court which directs the witness to cooperate or be in contempt of the court." (Civil Service Procedural Rules, rule 5.21(c).)

authorizes the hearing officer to report to the Commission any violation of rule 5.20, which generally prohibits interference with the orderly conduct of a hearing.[3] Rule 5.21(a) authorizes the Commission, after receiving a report from the hearing officer and affording the offender due process, to suspend the offender from the hearing, issue a warning, or take no action and resume the hearing.[4]

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3. "It is improper for any person at a hearing to: [¶] a) Insult, intimidate or behave discourteously to the Hearing Officer, any party, any witness or any other person attending the hearing; [¶] b) Display boisterous conduct or commit any kind of disturbance; [¶] c) Bring signs, posters, or large objects into the hearing room without the prior approval of the hearing Officer; [¶] d) Participate in any demonstration tending to disrupt the orderly conduct of the hearing; or [¶] e) Commit any other interference with the orderly course of a hearing." (Civil Service Procedural Rules, rule 5.20.)

4. "If the conduct of an advocate or counsel is in violation of Rule 5.20, the Hearing Officer, at his discretion, may formally warn the offender or suspend the hearing. In either case, the Hearing Officer shall file a written report to the Civil Service Commission describing the behavior and action taken.

"a) The Commission, after receiving the report and after allowing the offender due process, may, depending on the severity of the action, and the frequency of its occurrence: [¶] 1) Suspend the advocate or counsel from the particular hearing and resume the hearing with another advocate or counsel of the affected party's choice; [¶] 2) Suspend the advocate or counsel from appearing at any Civil Service

(Cont'd)

Weissburg challenges the hearing officer's failure to refer to the Commission the Department's purported failure to produce documents responsive to the subpoenas. She argues that the hearing officer was required to seek to enforce the subpoenas by referring the matter to the Commission, and that the hearing officer's failure to refer the matter to the Commission denied her a meaningful opportunity to obtain evidence supporting her claims and therefore denied her due process. Assuming without deciding that the Department failed to produce documents responsive to the subpoenas and that the failure constituted a witness's refusal to testify within the meaning of rule 5.21(c) or a violation of rule 5.20 of the Civil Service Procedural Rules, we conclude that the decision whether to refer the matter to the Commission was committed to the sound discretion of the hearing officer. Rule 5.21 states that if counsel violates rule 5.20, "the Hearing Officer, *at his discretion, may* formally warn the offender or suspend the hearing."[5] (Italics added.) Similarly, rule

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(Cont'd)
Hearing, for either a given period or for an indefinite period, and resume the hearing with another advocate or counsel of the affected party's choice; [¶] 3) Formally warn the offender, and resume the hearing; or [¶] 4) Take no action and resume the hearing." (Civil Service Procedural Rules, rule 5.21.)

5. "[T]he Hearing Officer *shall* file a written report to the Civil Service Commission describing the behavior and action taken" (italics added), under rule 5.21 of the Civil Service Procedural Rules only if the hearing officer actually exercises his or her discretion to formally warn the offender or suspend the hearing.

5.21(c) states that if a witness refuses to testify or violates rule 5.20, "the Hearing Officer *may* suspend the hearing" (italics added) and recommend that the Commission seek judicial enforcement through the county counsel. This language commits to the discretion of the hearing officer the decision whether to formally warn the offender, or suspend the hearing and then report the matter to the Commission, or refer the matter to the Commission for judicial enforcement through county counsel. The hearing officer was not required to take those measures in all circumstances irrespective of the nature or severity of the purported violation.

Weissburg does not discuss the nature of the purportedly missing documents or their significance to her claims. She therefore has not shown that the circumstances here compel the conclusion that the hearing officer was required to take the enforcement measures available under rule 5.20 or 5.21 of the Civil Procedural Rules or that the failure to do so was a prejudicial abuse of discretion or a denial of due process.

Weissburg also apparently argues that the Department interfered with the orderly conduct of the hearing by failing to timely produce subpoenaed documents, producing documents that were false and misleading, and destroying documents, and that the hearing officer's failure to report those violations to the Commission, and the Commission's failure to impose sanctions, was an abuse of discretion. Weissburg describes several purported instances of the

Department's failure to timely produce documents, production of documents that were severely redacted, and destruction of documents. The hearing officer determined on at least one occasion that the Department had acted in good faith despite its failure to timely produce documents, and in denying sanctions on other occasions impliedly determined either that the Department had acted in good faith or that sanctions were otherwise inappropriate. Weissburg has not shown that the exercise of discretion by the hearing officer lacked a reasonable basis, or that the record compels the conclusion that the Department interfered with the orderly conduct of the hearing as contemplated by rule 5.20. Moreover, she does not adequately explain how she was prejudiced by the purported misconduct in light of the evidence supporting the Commission's findings on the merits of her claims. We conclude that Weissburg has shown no error.

3. *Weissburg Has Shown No Error in the Finding of No Causation*

The hearing officer and the Commission found that Lopez was the Department employee who decided to create a new overnight shift for an Assistant Regional Administrator and assigned Weissburg to that position. Weissburg previously supervised social workers on both the day shift and the overnight shift, although her working hours were limited to the day shift. Lopez determined that greater onsite supervision was required overnight, asked for volunteers, and after receiving none assigned Weissburg to the new overnight

shift. The hearing officer and the Commission determined that there was no evidence that Lopez was aware of the discrimination claim at the time of her decision and therefore no evidence of a causal connection between the claim and the purported act of retaliation.

Weissburg argues that persons other than Lopez either ratified or otherwise contributed to the decision to change her working hours and that those persons were aware of her discrimination claim. Regardless of whether persons other than Lopez contributed to the decision, the question whether Weissburg suffered retaliation as a result of her protected activity (i.e., causation) is a question of fact. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1062; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 156.) Weissburg does not meaningfully discuss the evidence showing that there were legitimate reasons for the decision and has not shown that the evidence compels the conclusion that her working hours were changed in retaliation for her discrimination claim.

Weissburg argues that causation is established if the employer knew or should have known of a retaliatory act by an employee, yet failed to prevent it.[6] We need

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6. Weissburg cites *Burlington N. & S.F.R. Co. v. White* (2006) 548 U.S. 53 [126 S.Ct. 2405] in support of this proposition. *Burlington* held that the anti-retaliation provision in title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) prohibits any materially adverse act of retaliation rather than only retaliatory acts affecting the terms and conditions of employment. (*Burlington, supra,* at pp. 67-68.)

not address the merits of this argument because Weissburg has failed to show that the decision to change her work hours was motivated by retaliation.

4. *Weissburg Has Established No Basis for Reversal Due to the Purported Incompleteness of the Administrative Record*

Weissburg's contention that the administrative record before the trial court was incomplete is based on her assumption as to the contents of the box discovered in the Commission's offices in February 2008. She describes the documents in the box as "essential Exhibits and declarations of key witnesses" and "[e]ssential declarations about the failure of [the Department] to produce documents," but does not specifically identify the documents or the declarants. She acknowledges that she declined the Commission's offer to return to its offices to review the documents because she is convinced that any documents favorable to her must have been removed. She offers no evidence to contradict the Commission's declarations that the box contained only copies of documents from Weissburg's file and the hearing officer's working papers.

Weissburg offers no legal argument to explain why these circumstances should justify reversal. We conclude that she has not established that the administrative record was incomplete and has shown no prejudicial error.

5. *County Counsel's Dual Role Provides No Basis for Reversal*

Weissburg asked the Commission to stay the decision to change her working hours. After Weissburg and the county counsel, on behalf of the Department, briefed the issue, the Commission requested an opinion from the county counsel. The county counsel advised the Commission that it had no authority to issue such a stay, and the Commission denied a stay.[7] There is no indication that the county counsel acted as legal advisor to the Commission in connection with the hearing on the merits. Weissburg contends the county counsel's representation of the Department while providing legal advice to the Commission in the same matter was a conflict of interest.

Weissburg has not shown that she objected to the county counsel's dual role in any manner in the proceeding before the Commission. She did not move to disqualify the county counsel from representing either the Department or the Commission. Because it was not called upon to decide the issue, the Commission

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7. Weissburg filed a petition for writ of mandate in the trial court, challenging the denial of a stay. The court denied the petition as moot in light of her reassignment to a day shift. Weissburg appealed the judgment. Division One of the Second District Court of Appeal concluded that the issue was moot, and affirmed the judgment. (*Weissburg v. Los Angeles Civil Service Commission* (Nov. 22, 2006, B190440) [nonpub. opn.].) We take judicial notice of the opinion by the Court of Appeal. (Evid. Code, § 452, subd. (d).)

made no finding as to whether the deputy county counsel involved were sufficiently insulated from one another. (See *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at p. 96; *12319 Corp. v.. Business License Com.* (1982) 137 Cal.App.3d 54, 61.) Weissburg cites no evidence in the record to show either that the deputy county counsel representing the Department was not sufficiently insulated from the deputy county counsel advising the Commission or that there was any indication of bias or unfairness by the county counsel.

Apart from these concerns, Weissburg does not explain how a purported conflict of interest with respect to the ruling on the stay motion prejudiced the ruling on the merits of Weissburg's claims or denied her a fair hearing on the merits. Absent such a showing, we conclude that Weissburg has shown no basis for reversal.[8]

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8. Weissburg also argues that the county counsel improperly acted in dual capacities in connection with the box of documents discovered in the Commission's offices. We conclude that she has shown no prejudice and no basis for reversal for the same reasons discussed *ante*.

Appendix A

DISPOSITION

The judgment is affirmed. The Department is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P.J.

KITCHING, J.

APPENDIX B — STATEMENT OF DECISION OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DATED JULY 17, 2007

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

COURT ORDER RE: PETITION FOR WRIT OF MANDATE

CASE NO. BS105855
HONORABLE AURELIO MUNOZ, JUDGE
MINUTES ENTERED 07/16/07 A. CISNEROS
COUNTY CLERK
170.6 JANAVS
170.6 DAVID P. YAFFE

Deputy Sheriff L. CEJA, C.A.
Reporter None; DEFT. 47
NO APPEARANCES

DIANE B. WEISSBURG

VS

LOS ANGELES COUNTY CIVIL COMMISSION

STATEMENT OF DECISION

FACTS

Petitioner Diane Weissburg, (Petitioner) is an employee of the Department of Children and Family Services (Department) and holds the position of

Assistant Regional Administrator (ARA). She applied for, but did not receive a promotion to the position of Regional Administrator (RA). On July 27, 2005 she appealed her non-promotion to the Civil Service Commission (Commission) alleging she had been denied the promotion because she was Caucasian.

Thereafter, on September 28, 2005, she filed an additional claim alleging the Department had retaliated against her by changing her work hours from the day shift to the night shift. Later, on November 8, 2005 Petitioner filed a third claim alleging the Department had placed her on an involuntary leave under the Family Medical Leave Act[1] (FMLA)

The Commission agreed to consider all three claims. Between November 16, 2005 and April 20, 2006 an interrupted hearing was held. Following argument, the Hearing Officer concluded there was no intentional racial discrimination or retaliation against Petitioner. He further concluded that because Petitioner had not actually been placed on FMLA, she had suffered no economic loss. The Hearing Officer's findings and conclusions of law were adopted by the Commission. On October 20, 2006, Petitioner filed this petition for Writ of Mandamus seeking to set aside the Commission's decision upholding the Department.

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1. Goverment Code Section. 12945.1. et seq.

Appendix B

THE STANDARD FOR THIS WRIT

The first issue in contention is the standard this court should apply in reviewing this matter. Petitioner argues this court should apply the independent judgment standard of review, whereas the Department asks this court to apply the substantial evidence test. The Department contends that because there is no fundamental vested right to either a promotion or to keep a day shift position, this court is limited to examining whether the conclusions of the hearing officer and the decision of the Commission are supported by substantial evidence. (See *Nunez v. City of Los Angeles* (9th Cir.1988) 147 Fed.3d 867, 871-873; *Fukuda v. City of Los Angeles* (1999) 20 Cal.4th 805, 824.) Using that standard, all conflicts and inferences are resolved in favor of supporting the Commission's findings. *(MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 218-219.)

Petitioner, on the other hand, argues she had a fundamentally vested right to be free of discrimination based upon her race and that she was denied her promotion and experienced harassment and retaliation because of her race. These allegations, she argues, require this court to use its independent judgment in examining the record below. This court agrees with petitioner and is of the opinion that in reviewing the Commission's decision, the court should apply the independent judgment standard of review. This standard requires the court to independently weigh the evidence keeping in mind there is a strong presumption

that the administrative findings are correct and that Petitioner bears the burden of proof in proving the findings are against the weight of the evidence. (*Fukuda v. City of Los Angeles*, supra., 20 Cal.4th at 817.) Questions of law are reviewed de novo. (*Cal. Sch. Employees Ass'n v. Dep't of Motor Vehicles* (1988) 203 Cal.App.3d 634, 644.)

THE COMPOSITION OF THE WATERIDGE INTERVIEW PANEL DID NOT DEPRIVE PETITIONER OF HER CONSTITUTIONAL RIGHTS.

Prior to the actual selection process there had been a Phase 1 interview that was composed of two African-Americans, two Caucasians, one Hispanic and one Asian/Pacific. That panel had unanimously rated petitioner as "Recommend" and Dr. Sander[illegible] the person who received the appointment, as "St[illegible]gly Recommended." No allegations of discrimination were raised by Petitioner as to the hearing before this panel. The applicants were invited to apply for vacant positions. Petitioner applied for a vacant position at Wateridge.

In Phase two all of the candidates were asked the same questions. In the Wateridge hearings the questions had been written by Amaryllis Watkins (African-American) a deputy director of the Department. Ms. Watkins had defined the needs of the office as team-building, meeting Department goals, working with changing demographics and developing and encouraging staff and creating high morale. The

questions had been written to determine how the candidates would deal with and meet the needs of the office[2].

Petitioner initially contends that she was discriminated against when she appeared before the Wateridge Panel which was composed entirely of African-Americans. Prior to that hearing the Department had determined that the panel members should consist of persons both inside and outside of the Department. The interview panel was then selected by the District Director, who is African-American and her assistant, who is a female Filipino. The assistant coordinated the selection process and contacted the staff and public members by phone and neither the District Director nor her assistant were aware of the racial composition of the panel until the panel members appeared for the interviews on June 14, 2005.

Petitioner claims she was surprised when she first saw the composition of the panel and that "she shut down" when asked if a white woman could run an all-Black office. She did not complain about the composition of the panel at that time and the notes of the interview panel reflect Petitioner's answers to the interview questions, including those regarding cultural diversity,

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2. The record reveals that the composition of the people served by the Wateridge Office had been fluctuating over the past twenty-five years. The office served South Los Angeles and had changed from being predominantly African-American to predominant Hispanic with large African-American and Asian communities and pockets of Native Americans.

were articulate and well received. The Commission determined the same questions were asked of all RA applicants and there was no unfairness to Petitioner.

Petitioner further contends that because one of the interviewers left before her interview was completed she was denied a fair hearing. The member that left claimed the reason she left was because she was not feeling well. Petitioner questions why this occurred, but she has not shown that she was in any way discriminated against by the five remaining members of the panel or that the missing member of the panel in any way caused her prejudice.

Of the five candidates selected during Phase II, there was one white applicant, Jennifer Hottenroth. Ms. Hottenroth felt very positive about the process and did not think there was unfairness or bias in the panel composition or the questions that were asked. The fact that a white applicant made it to the final selection phase is a clear indication the panel was not biased against white applicants. Petitioner has not shown she was denied a fair hearing simply because the panel was composed entirely of African-Americans.

Dr. Sanders, the person ultimately selected as the RA for Wateridge was selected because of his commitment to working with children, the issue the panel was most concerned with. Even though Petitioner had "Line" experience in addition to legislative and financial experience. Dr. Sanders had 30 years experience working with adolescents and the probation

department. In selecting Dr. Sanders, the Panel selected him because of his greater commitment to working with the community, families, and children. Petitioner's contention that she should have been selected because she has more degrees than Dr. Sanders does not withstand analysis. The panel was concerned with the qualifications regarding experience with children and families. Based upon Dr. Sanders' greater experience in this area the Commission determined Petitioner was not the subject of discrimination. That conclusion is supported by the record.

PETITIONER WAS NOT HARASSED AND DISCRIMINATED AGAINST BECAUSE OF HER COMPLAINTS REGARDING VIOLATIONS OF RULE 25

On August 9, 2005, while Petitioner's claims were pending before the Commission,[3] Ms. Jennifer Lopez became the Regional Administrator (RA) at the Department's Emergency Command Post (ERCP) where Petitioner was working. On weekends, and after business hours, the ERCP functions as a clearing house for any children brought into the system because of neglect, abuse or criminal activity.

When Ms. Lopez took over ERCP it was in a state of turmoil and had been under scrutiny because of

3. On July 27, 2005, Petitioner requested a hearing before the Civil Service Commission based upon her contention that she had not been selected for the Wateridge because of her race.

newspaper articles and concern on the part of the Board of Supervisors. MacLaren Hall had been closed and, as a result, there were overstays of harder to place children who were found to be sleeping in the ERCP facility. An "Overstay Work Group" determined that 71% of the children who were staying for inordinately long periods of time were arriving at the facility during graveyard hours. Ms. Lopez began an extensive review and assessment of the ERCP and determined she would restructure the night shift. Coincidentally, she had also received an e-mail questioning why social workers who had been assigned to the graveyard shift's command post were getting paid to sleep at home. Based upon her assessment of the problem, Ms. Lopez decided to put an ARA on the graveyard shift on the busiest nights which were Friday, Saturday, Sunday and Monday. Up until this time, managers had been available by phone.

In trying to assess the problem Ms. Lopez herself worked until 4:00 a.m. for two months. During this time people were coming to her with questions at 2:00, 3:00 and even 4:00 a.m. She concluded there was a full time night operation running with no one managing it. She also determined social workers were making critical decisions without an ARA on site and the social workers working the graveyard shift were overwhelmed. During the time Ms. Lopez was working the graveyard shift the overstays significantly decreased. Accordingly, she decided to put a manager in place during the night shift. On September 19, 2005 Ms. Lopez received permission to make the shift change and place an ARA at night at the ERCP.

Appendix B

Petitioner, who was the manager of the daytime and graveyard shifts, was selected to be the night online manager at ERCP because she had the least seniority and she was already the supervisor of the graveyard shift. Shortly after being notified that she was to be the night supervisor, Petitioner objected, in writing, to the change in assignment and notified Ms. Lopez of her pending Rule 25 complaint. This was the first time Ms. Lopez became aware of Petitioner's pending complaint.

Because Petitioner's change in assignment came right after she had filed a complaint alleging violation of Rule 25, Petitioner alleges this was sufficient to show she was retaliated against by the Department. However, Ms. Lopez who made the change in assignment did not know of the pending allegations. Thus her motivating reason for assigning Petitioner to the night shift could not have been because Petitioner had filed a Rule 25 complaint; in other words, there is no causal Connection between Petitioner's Rule 25 complaint and her being subsequently assigned to the night shift. (See *Morgan v. Regents of the Univ. of Cal.* (2000) 88 Cal. App. 4th 52, 70; *Iwekaogwu v. City of L.A.* (1999) 75 Cal.App. 4th 803, 813-814.) Thus, her retaliation allegations fail.

The Department began an investigation and interviewed the District Director Amaryllis Watkins, the person who had initially composed the interview questions and assembled the interview panel. On September 21, 2005 Petitioner was granted a hearing by the Commission.

Appendix B

DID THE DEPARTMENT'S THREAT TO PLACE HER ON MEDICAL LEAVE CONSTITUTE HARASSMENT AND RETALIATION?

Petitioner only worked one weekend of the new assignment. By the next weekend she had become ill and her had doctor restricted her from working between 6:00 p.m. and 6:00 a.m. Petitioner then filed an application for a medical hardship and requested a day position consistent with the restrictions imposed by her doctor.

Petitioner was approved for a medical leave after the doctor's letter was received, but she was never actually placed on medical leave; her salary remained the same and her work schedule was changed to days. In fact, Petitioner, because she refused to sign the 4/40 form that would have allowed the time keepers to adjust her compensation, was overpaid a total of $4,545.02. As the hearing officer concluded, " (T)he Department never actually placed . . . (Petitioner) on FMLA leave and continued to pay her as she was working her regular daytime shift during the week." Thus, the evidence supports the conclusion that Petitioner suffered no damage.

PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Petitioner claims her due process rights were violated in that she was denied discovery. However, there is no evidence Petitioner sought to enforce any subpoenas before the Superior Court. (See *People v.*

West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462.) Likewise she has not shown her rights to cross-examine or present affirmative evidence was in any way infringed. In short, she has failed to show how her due process rights were violated.

CONCLUSION

The petition for writ of Mandate is denied.

IT IS SO ORDERED:

JUDGE OF THE SUPERIOR COURT
HONORABLE, AURELIO MUNOZ

DATE
July 17, 2007

APPENDIX C — ORDER OF THE CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES DATED OCTOBER 11, 2006

BEFORE THE CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES

In the matter of the appeal of the **non-appointment** to the position of Regional Administrator, Wateridge Office, on a claim of violation of Civil Service Rule 25 based on race, and **reassignment** in the position of Assistant Regional Administrator, Department of Children and Family Services, on a claim of retaliation and harassment, of:

DIANE B. WEISSBURG
(Case No. 05-312)

ORDER OF THE CIVIL SERVICE COMMISSION

On October 4, 2006, the Civil Service Commission of the County of Los Angeles, having read the foregoing findings of fact and conclusions of law, and good cause appearing therefor, overruled the objections and adopted, as constituting its final decision, the findings and recommendation of its duly appointed Hearing Officer, Terri A. Tucker, to deny the appeal.

Dated this 11th day of October 2006.

Appendix C

s/ Z. Greg Kahwajian
Z. GREG KAHWAJIAN, President

s/ Frank Binch
FRANK BINCH, Member

s/ Vange Felton
VANGE FELTON, Member

s/ Carol Fox
CAROL FOX, Member

s/ Evelyn Martinez
EVELYN MARTINEZ, Member

APPENDIX D — LETTER FROM TERRI A. TUCKER TO HONORABLE COMMISSIONERS DATED AUGUST 22, 2006

TERRI A. TUCKER
ATTORNEY AT LAW • MEDIATOR •ARBITRATOR

August 22, 2006
Civil Service Commission
County of Los Angeles
500 W. Temple Street, Room 522
Los Angeles, CA 90012

Re: Diane Weissburg (Case No. 05-3 12)

Honorable Commissioners:

I am writing in response to your request for clarification of my recommendation in the above referenced case in light of the United States Supreme Court decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. (June 22, 2006), a case which resolved a conflict among the circuit courts as to whether the employer's challenged action in a retaliation case has to be employment or workplace related, and about how harmful that action must be to constitute retaliation.

You asked the following questions:

1. Whether or not the department's actions regarding FMLA and the appellant would constitute an adverse impact under the *Burlington Northern* case.

2. Assuming adverse impact is established, whether or not the appellant met her burden of proving causation for the FMLA issue.

Question No. 1.

As you will recall, Ms. Weissburg refused to sign a request to change her work schedule, and thus effectively blocked the imposition of the schedule change that together with her medical restriction, would have created the vacuum to be filled by unpaid FMLA leave. She therefore was never placed on FMLA leave and continued to be paid her regular salary every pay period between the time she was first assigned to the graveyard shift, and the time she was transferred to a different location on day shift. *The record thus did not support a finding that FMLA leave was ever imposed on* Ms. Weissburg. See Recommended Decision, pp 32-33 and Finding of Fact No. 32.

The argument made in Ms. Weissburg's Objections appears to be the Department's approval of FMLA leave for Ms. Weissburg created a threat of that she might lose money, and therefore a situation comparable to that of White, the plaintiff in *Burlington Northern.* In that case, White was suspended without pay for 37 days for insubordination shortly after she filed retaliation claims with the EEOC, and experienced physical and emotional hardship as a result. The Court noted that many reasonable employees would find a month without a paycheck to be a serious hardship (Slip Opinion, at 18) and held that the mere fact that White

eventually recovered the back pay through the grievance procedure did not change the fact that a month long suspension without pay was a materially adverse employer action.

In this case, Ms. Weissburg was never without her regular salary. Although Ms. Weissburg may have initially believed, as did her supervisor Jennifer Lopez, that Payroll was using her accumulated time off to pay her for FMLA hours, this was not the case. Further, the record shows that Ms. Weissburg freely contacted Payroll with questions about her paycheck, and thus at any time could easily have determined that her time was not being coded as FMLA leave. There is nothing in the record to indicate otherwise, and no evidence of any hardship or deterrent effect associated with FMLA leave. The Department's actions regarding FMLA and Ms. Weissburg therefore do not constitute action supportive of a retaliation claim under the *Burlington Northern* standard.

Question No. 2.

Because there is no showing of adverse impact sufficient to meet the *Burlington Northern* standard, I do not reach the issue of causation.

If you have additional questions I will be happy to answer them.

Very truly yours,
Terri Tucker
Hearing Officer

Decisions adopted by the Los Angeles County Civil Service Commission October 11, 2006.

Writ of Mandate filed Los Angeles County Superior Court October 20, 2006.

APPENDIX E — RECOMMENDED DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE LOS ANGELES COUNTY CIVIL SERVICE COMMISSION DATED JUNE 13, 2006

LOS ANGELES COUNTY
CIVIL SERVICE COMMISSION

Case Nos: 05-312 and 05-578

RECOMMENDED DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In re the Appeal of:

DIANE B. WEISSBURG,

Appellant,

and

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES,

Respondent

STATEMENT OF THE CASE

The hearing in the above-captioned matter was held before the undersigned Hearing Officer on the following ten dates: November 16, 18, 2005 and February 10, March 24 and 28, and April 3, 5, 6, 19 and 20, 2006. It concerned the appeal by Appellant Diane B. Weissburg

(Appellant) of her non-appointment to the position of Regional Administrator of the Wateridge Office, Department of Children and Family Services ("the Department) on her claim of violation of CMI Service Rule 25 based on race, and her subsequent and allegedly retaliatory reassignment as an Assistant Regional Administrator from days, to a weekend graveyard shift.

Appellant is an attorney and appeared in pro per, and was at times assisted by Co-counsel Joan Daniels. The Department was represented by Karen Sarames, and later by Ronald Chavez, both attorneys from Thever & Associates. All witnesses testified under oath. A court reporter recorded the proceedings, but no transcript was submitted to the Hearing Officer. Appellant submitted a timely written closing argument.

The Department submitted a closing argument after the deadline for its submission and pursuant to the Commission's rules, it was therefore not considered.

INTRODUCTION

This case consists of two claims. Appellant's first claim is that she was not promoted to the position of Regional Administrator (RA) of the Department's Wateridge office because she is White.[1] The second is of

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[1] Although Appellant occasionally describes her claim as discrimination based on both race *and gender*. gender discrimination was not part of her original allegations, and is not an issue certified by the commission in this case. In addition, I note that Appellant chose the racial descriptor "White" to describe herself, and I have chosen to follow her lead in that regard.

retaliation against her for filing a discrimination claim, in the form of a punitive assignment to a weekend graveyard schedule that had never before been assigned to a manager at her level, and by placing her on Family Medical Leave Act (FMLA) leave over her objection and to her financial detriment. The Department denies both claims.

ISSUES

The issues presented to the hearing officer for decision are as follows:

1. Did Appellant's non-appointment to the position of Regional Administrator, [Wateridge Office,] arise in material part from her race as alleged in her petition dated July 27, 2005, and her supplements dated August 19. 2005 and September 12, 2005?

2. If so, what is the remedy?

3. Did Appellant's change in shift arise from retaliation for exercise of her Civil Service appeal rights as alleged in her moving papers?

4. If so, what is the remedy?

5. Did the Department place the Appellant on Family Medical Leave over her objection with resulting loss of compensation as alleged in her petition?

6. If so, did this action arise from retaliation against Appellant for previous exercise of appeal rights in violation of Civil Service Rule 25?

7. If so, what is the remedy?

FACTUAL SUMMARY

A. INTRODUCTION

An Assistant Regional Administrator ("ARA" or "Manager") directs, monitors and coordinates work throughout a section. In addition to educational requirements of a Master's degree in a related field, a manager must be proficient in the knowledge of managerial and supervisory processes. ARAs have a wide variety of duties, but generally supervise staff, attend meetings, assist in developing an annual budget, address staffing requirements, supervise other programs, establish outstations, attend meetings on behalf of the Regional Administrator ("RA").

B. THE 2004-2005 REGIONAL ADMINISTRATOR SELECTION PROCESS

1. Qualification of candidates

In December 2004 the Department issued a Job Opportunity bulletin for the position of Regional Administrator. The position was to remain open until all staffing needs were filled. The applicants were first assessed by means of a Management Appraisal and

Performance Plan (MAPP) by the ARAs' supervisors, and the MAPP scores were used to place them in categories of priority: All of the eligible candidates had scores which placed them in Band 1.

The first list of eligible candidates was promulgated on April 19, and an updated list on October 4, 2005. Later eligibility dates reflect later applications which were held because they did not meet the requirements at the time of the first list. However there was a period of six months in which individuals could meet the requirements if the exam is still open.[2] All registered

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[2] Appellant has argued that Jennifer Lopez was a "pre-selected" candidate who was less qualified than others for the position of RA at the Emergency Response Command Post, and that this pre-selection was discriminatory. The primary assertion in support of the "pre-selection" argument was that Lopez was not on the April 19, 2005 certification list and in fact was not certified by Human Resources as a candidate until June 9. This fact is not persuasive, as the exam remained open until October 4, 2005 when all of the positions had been filled. Appellant also argues that the fact that Lopez was allowed or invited to participate in the Phase I interviews prior to her certification date is evidence of pre-selection and special treatment. Although that dispensation remains unexplained, I do not consider any special treatment Lopez may have received as consistent with Appellant's theory of her case. Indeed Appellant has argued and has put on evidence to suggest that the discrimination she experienced was a concerted effort by African American administrators to exclude non-African Americans, Hispanic and White alike, from high level positions. Preferential treatment enjoyed by Lopez, who is Hispanic, tends to disprove that theory.

candidates were asked to indicate the offices for which they wanted to be considered.

2. Phase I interview

The first step in the process was a Phase I interview. David Waage (White), Personnel Officer III in the Department's Human Resources office ("HR") created this part of the process. Phase I was not an examination, but a placement interview which provided an opportunity to get information from a large number of candidates about their individual suitability for the position. All of the registered candidates were invited to participate in the interview.

Although the Phase I interview was thus not a prerequisite for participating in the Phase II interview, both Appellant and Sanders were interviewed by the Phase I panel for the Wateridge office. That panel was made up of six members: two African-Americans; two Whites; one Hispanic and one Asian/Pacific. The Phase I panel unanimously rated Appellant as "Recommended" and Sanders as "Strongly Recommended," There is no allegation of discrimination regarding Appellant's experience in the Phase I interview.

3. Phase II (Wateridge)

Candidates were invited to apply for vacant positions in the offices in which they had indicated interest. Appellant applied for several RA positions, including the position at Wateridge, and was invited to a Phase II

interview. In Phase II, the Deputy Directors wrote questions for each interview panel to present. All candidates for a particular office were asked the same, open ended questions, which elicited answers about how candidates would run the office, and meet the needs of the office. Amaryllis Watkins (African American) wrote the questions for the Wateridge office, and defined the needs of that office as teambuilding, meeting Department goals, working with changing demographics, creating high morale and encouraging staff.

The interview panels for each office were created at the direction of the respective Deputy Directors. Watkins was therefore in charge of forming a Phase II interview panel for the RA position at the Wateridge regional office. Her assistant Aristeo Banico (Filipino) did the administrative work to form and coordinate the panel. The Department has described the Phase II interview as an effort to involve the stakeholders in the outcome: staff members from the Regional Office for which the RA was being selected, and (consistent with the Departments "Points of Engagement community outreach program) community partners involved in providing services for the children and families the Regional Office serves.

The Phase II interview panel ultimately consisted of six people: Deputy Director of Service Bureau 2 Amaryllis Watkins, who invited Executive Assistant to the Director of the Department Anita Shannon to participate; two community partners (one selected at

random from the Wateridge Community Advisory Board, and one volunteer); two members of the Wateridge staff, a Supervising Children's Social Worker ("SCSW") on the Service Planning Area Council and a Children's Social Worker ("CSW") from the Staff Advisory Forum. Neither Watkins nor Banico knew the race of the community partners or the staff members on the panel until the June 14, 2005 interview, as they had only spoken to the prospective panel members by phone.

The Wateridge interview took place on June 14, 2005. The interview panel consisted of six African Americans. One member of the panel, Anita Shannon, left the room as Appellant was entering, saying "I'm leaving." Shannon testified that she left because she was not feeling well. Appellant testified that she was shaken by the racial composition of the panel, and by Shannon's departure. The panelist's interview notes indicate that Appellant was asked and answered the same set of scripted questions presented to all of the Wateridge candidates. See DXO.

The sixth question was "How would you deal with the issues of cultural diversities?" The record explains that for 25 or more years, the Wateridge office has served South Los Angeles, from mid-city to the West, and that it is an area that has changed over the years from being predominantly African American, to predominantly Hispanic, with large African American and Asian communities, as well as pockets of Native Americans.

Appellant testified to her perception that fully half of the questions asked in the interview were racially or

culturally based, including a question that referenced Black churches, and that she got the feeling that they wanted to know "if a White woman could run an all-Black office." She testified that she just "shut down" and began to answer monosyllabically. The interview notes of her response to the questions, including the question about cultural diversity, appear to indicate complete and articulate answers that were well-received.

Seven candidates interviewed for the Wateridge position: five African Americans, and two Whites. Jennifer Hottenroth was the only other White to interview for the Wateridge RA position. Hottenroth had a very positive response to the interview. She testified that she was relieved when she entered the interview room and saw three people she knew and liked on the panel. She did not think about race in relation to the panel. She was asked the question about cultural diversity that is on the list of questions (DXO), and understood the question to ask about differences in culture, values, traditions which they as social workers want to be aware of and sensitive to. She did not feel the question was directed at one particular group or another.

At the end of the Phase II interviews, there was a round table discussion and the panel selected the top five candidates for the position. Appellant was not one of those five. Hottenroth was among the five, as was the successful candidate, Stephen Sanders.

Appendix E

4. Phase III

Phase III of the RA selection process was a meeting of the Executive Team, consisting of Director David Sanders, Executive Assistant to the Director Anita Shannon, the five Deputy Directors and a Medical Director. The racial composition of the Executive Team was three African Americans, three Whites, one Asian and one Hispanic. Watkins presented five candidates selected by the Phase II panel to the Executive Team for consideration for the Wateridge position: Stephen Sanders, Cleo Robinson, Jennifer Hottenroth, Martha Brissette-Blackburn and an employee with the last name of Watson.

The primary reason articulated by Amaryllis Watkins for not selecting Appellant as one of the candidates to be presented to the Executive Team, was that although Appellant came across in the interview as very intelligent, energetic and accomplished, what did not come through as much as it did with the other candidates was a strong commitment to work with children, families, and community. She testified that the panel was looking for talk in the interview about how to accomplish the goals of the Department, and a commitment to children and families. See the panel members' notes from Appellant's interview, DXO, 1-6.

Watkins selected Sanders as one of the five candidates to be presented to the Executive Team because of his background: 30 or more years of experience in the Department; the fact that he had been

an ARA in the regions and in adoption, a budget analyst, worked with the Probation Department, in the Independent Living Program, and had done a lot of community work with adolescents; and that he had a Ph.D. from USC in social work, Masters' degrees in social work and sociology. She also selected him because in his interview he communicated a tremendous commitment to the children.

In the broad view, the record shows that Appellant had a great deal of both line experience and financial and legislative experience, and that Sanders had a great deal of administrative experience and hands-on experience in programs with adolescents and families.

Stephen Sanders (African American) was ultimately the successful candidate for the Wateridge RA position.[3] The comparable data regarding each candidate demonstrates that Sanders was equally or more qualified than Appellant. Although Appellant's MAPP score was a 4, her numerical score was 95%; Sanders' score was also 4, but with a numerical score of 100%. Appellant had 22 years of departmental experience; Sanders had 30. Appellant has a BA from Antioch University in Arts; a Master's degree in Clinical Psychology from Antioch; a PhD. from Pacific Western University in Clinical Psychology, and a J.D, from the University of West Los Angeles. Sanders has a BA from the University of Chicago in Sociology; a Mas+ers degree

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[3] Since 1980, every RA at the Wateridge office has been African American.

in Sociology from CSU Los Angeles, in Social Work from CSU Long Beach; and a PhD. in Social Work form USC.

The other two vacancies in Watkins' service area were ERCP and Hotline. Jennifer Lopez (Hispanic) was selected for the Emergency Response Command Post ("ERCP"), and Cleo Robinson (African American) was chosen for Child Protection Hotline ("Hotline").

C. APPELLANT'S DISCRIMINATION CLAIM

On July 27, 2005, Appellant submitted a request for hearing to the Los Angeles County Civil Service Commission for violation of Rule 25. The claimed violation was a failure to promote her to the position of Regional Administrator, Wateridge Office, due to her race (White). She cited the all black interview panel and the fact that Anita Shannon left the room and did not participate in her interview.

On August 2, 2005 Appellant filed a Complaint of Discrimination by Anita Shannon and Amaryllis Watkins for denial of promotion on the basis of race with the Department of Fair Employment and Housing ("DFEH"). The reasons she gave were as follows: "Anita Shannon said "I'm leaving" and did not participate in my interview, although she did participate in the other successful candidate's interview, who was also black like Anita Shannon and Amaryllis Watkins."

On August 22, 2005 Watkins was interviewed as part of a Departmental investigation of Appellant's DFEH

charge. On September 21, 2005, the Civil Service Commission granted a hearing on the claim of non-promotion due to race discrimination.

D. APPELLANT'S ASSIGNMENT TO WEEKEND GRAVEYARD

At the time of the posting of the RA examination and during the RA selection process Appellant was assigned to the ERCP, working days as the Administrative ARA. She supervised the day and graveyard shifts, met with community partners to develop resources and oversaw the Paramount outstation. Appellant was also the manager of Out of County Services, (ICIP) a section that administers cases that come through the court in which another state is asking the County to take jurisdiction.

On August 9, 2005 Jennifer Lopez became the new RA at the ERCP. The ERCP operates 24/7, and functions at least in part as the clearinghouse for night and weekend placement of children who are referred by the Child Protection Hotline due to abuse or neglect, or are apprehended by law enforcement, or are otherwise in need of placement at times when the regional offices are closed.

ERCP is housed in an office building known as the Borax building, and is staffed by an RA, three ARAs, Supervising Children's Social Workers (SCSWs), Children's Social Workers (CSWs), and Technical Assistants (TAs). After business hours and on weekends,

instead of going to a regional office, children are brought to the ERCP to wait for a CSW, working with a TA, find an appropriate placement with a relative, foster home, group home, or other approved provider. Although many children come to ERCP and are quickly placed, others are hard to place for a variety of reasons such as behavioral issues, medical issues, criminal activity, or having a history of running away. Thus placement for these children, particularly late at night and on weekends, takes time. ARAs supervise SCSWs and CSWs, but are not a part of that placement process.

Prior to the closure of MacLaren Children's Hall in March 2003, these difficult to place children could be taken to MacLaren and stay there as long as it took to find an appropriate placement. When MacLaren closed, there was no stable placement plan for many of the children who frequently went to MacLaren. There were no resources to fill the gap. Although the ERCP is an office building with no residential facilities and no official approval for children to spend long hours or sleep there, in the absence of an alternative, many children did so.

The situation became an issue of concern to the Los Angeles County Board of Supervisors (the Board) and to the public in May 2003 when a series of stories on the subject of children sleeping at the ERCP was published in the Los Angeles Times. The Board called for resolution of the "overstay issue" and regular reports on the progress of that resolution. One effort made

without apparent result was the assignment of ARAs to the swing shift.[4]

An Overstay Workgroup was formed in early 2005 to study the overstay issue and propose action that would help resolve the problem. Lopez and Appellant were both members of the Overstay Workgroup. The strong consensus in the record and in the Overstay Workgroup Report issued April 15, 2005 (DXM) was that the cure for the overstay problem was an increase in the number of available placement resources. There was no recommendation in the report regarding the potential benefit of a manager on graveyard.

From June 2003 to May 2005, the number of overstays (children staying at the ERCP longer than four hours) *increased.* The numbers did not go down until they did so significantly in August and then again in September 2005 when there was an increase in the number of group homes and more beds available as resources. See AX28, 29 and 30.

On September 27, 2005 (shortly after this marked decrease in the number of overstays), Lopez assigned Appellant, effective October 14, 2005 to the graveyard shift, Friday to Monday. The letter, AX23, states Lopez' view, based on the July 2005 overstay logs, that "the presence of an "on-site" manager during these hours

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[4] Interim RA Norma Dreger assigned two ARM to the swing shift beginning in the summer of 2003. The overstay numbers did not improve, but in fact continued to increase. The assignment of ARAs to swing shift has continued to present.

[midnight to 6:00 a.m.] is critical if we are to minimize/ eliminate the overstay problem and support these youngsters by locating appropriate placements for them more quickly."

The Department's Human Resources Division Chief Sheryl Negash first heard about Appellant's assignment to graveyard in either late September or October. She asked Watkins about the underlying management need and Watkins told her about the overstays and the need to have a manager present.

Although ERCP is a 24 hour operation, neither ERCP nor Hotline (the only other 24 hour office in the Department) had ever had an ARA on graveyard. The only ERCP employees who worked graveyard prior to Appellant being assigned to that shift were Supervising Childrens Social Workers (SCSWs), Children's Social Workers (CSWs), and Technical Assistants (TAs) (clerical employees who check the computer and make calls to find placements for children). The graveyard shift was previously supervised by ARAs who were available by telephone during that shift on a rotational basis. The TAs are supervised by their own ARA who does not work graveyard.

In addition, although there had always been a graveyard shift of SCSWs, CSWs and TAs, the graveyard schedule at both ERCP and Hotline was either Sunday to Wednesday, or Wednesday to Saturday, with no employee working graveyard the entire weekend. There had ever been a Friday to Monday

graveyard schedule in ERCP for any job classification until Lopez assigned Appellant to work that schedule.[5]

Moving from days to graveyard meant that Appellant was unable to perform many of her usual functions. See DX23, p.2. She was not able to attend meetings with community partners to develop resources, attend trainings, attend most staff meetings, supervise the day shift, or, since the courts were closed, administer the ICPC. She was effectively stripped of all but the most basic ARA duties, and no longer had a secretary during her work hours, Indeed, Lopez testified that while on graveyard, Appellant's duties consisted of consulting as needed, reading packets (child abuse referral and response) and doing performance evaluations.

Nonetheless, the record consistently demonstrates that it was within Lopez' authority to create such a schedule *if operational needs required it.*[6] Lopez

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[5] Germaine Key (the previous RA of the ERCP) and Norma Dreger (the Acting and then Interim RA of the ERCP during periods of Key's absence) testified that they never assigned an ARA to a graveyard shift because they did not believe that it was necessary. *Key* testified that this was because there was not a high volume of work on graveyard, and the swing shift ARAs were on call during graveyard on a rotational basis and had the skills to manage employees on multiple shifts. In addition, there were supervisors (SCSWs) present on graveyard to oversee the CSWs.

[6] According to Sheryl Negash, Division chief of Human Resources at the Department, management can change the (Cont'd)

testified on several different days of the hearing, and on one of the later days acknowledged that the overstay numbers had gone down before she made the decision to assign an ARA to graveyard, hut that it was "critical" to have an on site graveyard Manager for the following reasons:

- She wanted an ARA on graveyard to be "proactive" and to go out to the police stations and outstations and make sure the CSWs were where they were supposed to be at night, as there were reports that many were not. [At this point there were managers (ARAs) as well as SCSWs on swing shift (4:00 p.m. until 2:30 a.m.), and SCSWs on graveyard (11:00 p.m. to 9:30 a.m.).]

- She believed it was important for child safety to have an ARA on site at night when critical incidents such as shaken baby and child fatalities occur. She testified that when these critical incidents occur, it is

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(Cont'd)

work shift of a manager to meet the operational needs of the Department. She told Watkins this on October 13, 2005. Likewise, Appellant's witnesses Germaine Key, Division Chief and former ERCP RA and Norma Dreger, former Interim ERCP RA believe that an RA has the authority to assign an employee to a particular shift or schedule if there was a need to do so.

"crucial to have a Manager to phone." [7] She also testified that she did not think it worked to have Managers on-call since the caller would be talking to someone who had just woken from sleep. She did not cite any instances in which the on-call ARA was not able to adequately respond to the call.

- She believed that the greatest number of overstays occurred on Friday to Monday nights and therefore chose those nights for the graveyard ARA. She relied on the overstay report issued in April 2005 for that opinion. See DXM. She acknowledges that from January to October 2005 the overstay numbers were going down. See AX32.

Lopez testified that she wrote a September 15, 2005 letter asking the three ARAs at ERCP (Appellant, Faye Mitchell and Asaye Tsegga) for volunteers for the graveyard shift, (DXD) and no one volunteered.[8] Lopez testified that she assessed the duties Appellant had been performing as the Administrative Deputy, and determined that a day shift ARA was not necessary. Although the letter said that Lopez herself would take

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[7] Managers were available by phone prior to Appellant's assignment to graveyard.

[8] This is not surprising, as Lopez's September 15, 2005 letter, OXO, presupposes that Appellant is the one who will be assigned to graveyard.

on Appellant's job duties, some were delegated, and she negotiated the off-loading of the ICPC (which required daytime interaction with the courts) to Hotline.

On September 27, 2005, Lopez assigned Appellant to the weekend graveyard shift. Lopez testified that Appellant was chosen for the graveyard shift because she had the least seniority as an ARA and in ERCP, and because she was already managing the graveyard during the day.

Mitchell testified that Lopez told the other ARAs that she needed a graveyard supervisor and that Appellant was being assigned to that shift, and that there was no discussion of seniority A number of ARAs and RAs testified that if they were to make an unpopular assignment and no one had volunteered, they would consult HR, and/or would consider using County seniority (as opposed to item seniority) to make the selection In later testimony, Lopez could not cite a source of her belief that item seniority was the appropriate standard, and eventually stated as a bottom line, that Appellant went to graveyard because she was the graveyard manager.

Appellant worked the first weekend she was assigned to graveyard, and part of the second. At that point her health began to suffer and on October 24, 2005 her doctor restricted her from working between the hours of 6:00 p.m. and 6:00 am. On or about October 24 Appellant stopped working graveyard, filed for workers compensation and for a medical hardship transfer to a day position consistent with her medical restriction.

Although Lopez testified that she herself sometimes stayed to work into the night after Appellant stopped working the graveyard shift, Lopez did not assign another ARA to graveyard in later October 2005 until February 2006, At that point she asked the swing shift ARAs, Faye Mitchell and Asaye Tsegga, to take turns covering graveyard. Mitchell testified that there is no reason for her to be there during the graveyard shift and that she has no interaction with the graveyard employees until 5:00 to 6:30 am. when they review cases.

Lena Ward, Manager of the Performance Management section of Human Resources in the Department testified that after she learned that Appellant had been assigned to a graveyard shift and that Appellant was protesting that assignment, she met with Negash and Lopez to discuss other sites Appellant could be assigned to. She told Negash that if Appellant left the graveyard shift at ERCP, management needed to cover that vacancy. Lopez testified thereafter that a new ARA had been recruited and is being hired for graveyard and the swing shift ARAs will return to swing shift.

D. THE IMPOSITION OF FMLA LEAVE

On November 1, 2005 Appellant attended an interactive meeting with Jennifer Lopez and Ed Guerrero, administrator of the Department's Worker's Compensation/Return to Work programs, and FMLA leaves. At that meeting Guerrero asked Lopez if there were available, daytime ARA positions and Lopez

said no. Appellant disagreed and said that there were such vacant positions.

Guerrero does not have the authority to tell a manager to reassign an employee, nor to tell a manager to put an employee in a position that is not available, Guerrero suggested that Appellant work the last three and a half, unrestricted hours of the assigned graveyard shift, and use FMLA leave for the six and a half hour balance.

Although Appellant did not agree that she qualified for FMLA, Guerrero believed that she did qualify due to her doctor's statement that she was under his continuing care. Guerrero was also waiting for additional medical information from Appellant's worker's compensation case, and felt while Appellant was waiting for worker's compensation benefits FMLA leave would protect her job and give her time to incrementally transition to the graveyard shift with her doctor's approval. Guerrero and Negash both testified that employees do not have the right to refuse FMLA leave if they qualify for it, and FMLA leave was approved.

After receiving Appellant's request for a medical hardship transfer, Guerrero also wrote a memo to Negash, recommending that the transfer take place. Although he was aware of a day shift vacancy at Hotline, his authority did not go beyond providing that recommendation. A transfer decision was in the hands of Negash and the Deputy Directors of the Bureaus involved.

Appendix E

On December 14, 2005 Negash notified Trish Ploehn, Deputy Director of Service Bureau 1 that Appellant was transferring to the Torrance office, an office that operates only during the day.

During the time that Appellant was assigned to work on the graveyard shift, Lopez believed that Appellant would use her accumulated vacation and comp time to continue receiving her regular pay. However, even though Lopez involuntarily placed Appellant on a four day, forty hour weekend graveyard shift, Appellant had refused to sign the form requesting the 4/40 schedule and without it the payroll employees were not able to pay her differently than her regular, 5/40 Monday through Friday schedule. This resulted in some underpayments and some overpayments brought about by holidays, overtime, night premiums and perhaps other factors, However, it did not keep her from receiving her regular salary during the time between October 14 and December 14, 2005.

Lopez both testified and submitted a declaration which says that she did not know that Appellant had filed a discrimination claim until Appellant gave her a copy of a memo dated September 29, 2005, with some attachments. On or about October 24, 2005, she learned of the retaliation claim and was interviewed and submitted declarations for that investigation.

Lopez and Watkins both testified that the assignment of Appellant to graveyard was entirely Lopez's idea, and based on her analysis and opinions of

the ERCP's operational needs. Lopez testified that when she worked on graveyard, people came to her at 2:00, 3:00 and 4:00 a.m. with questions. Lopez testified that there was a full operation running all night, and no one managing it. She therefore concluded that the most practical thing to do for the operation was to put a manager on the graveyard shift.

DISCUSSION

A. DID APPELLANT'S NON-APPOINTMENT TO THE POSITION OF REGIONAL ADMINISTRATOR, [WATERIDGE OFFICE,] ARISE IN MATERIAL PART FROM HER RACE AS ALLEGED IN HER PETITION DATED JULY 27, 2005, AND HER SUPPLEMENTS DATED AUGUST 19, 2005 AND SEPTEMBER 12, 2005?

Appellant claims that she was not promoted to the position of Regional Administrator (RA) at the Department's Wateridge office because she is White, and that the Department has thus violated Civil Service Rule 25. The rule, in pertinent part, reads as follows:

> 25.01 Employment practices. A. No person in the classified service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or discriminated against in employment or opportunity for employment because of *race*, color, religion, sex, physical handicap, medical condition, marital status, age, national origin

> or citizenship, ancestry, political opinions or affiliations, organizational membership or affiliation, or other non-merit factors, any of which are not substantially related to successful performance of the duties of the position. "Non-merit factors are those factors that relate exclusively to a personal or social characteristic or trait and are not substantially related to successful performance of the duties of the position. Any person who appeals alleging discrimination based on a non-merit factor must name the specific non-merit factor(s) on which discrimination is alleged to be based. No hearing shall be granted nor evidence heard relative to discrimination based on unspecified non-merit factors.

Although the claims before the Commission are brought under its Rule 25, the discrimination and retaliation law developed under Title VII of the federal Civil Rights Act of 1964, 42 USC §20003 et seq. and the California Fair Employment and Housing Act (FEHA), Govt. Code §12900 et seq., is both relevant and useful in addressing the certified issues. Both statutes prohibit discrimination on the basis of race. 42 USC §2000e *et seq.* and Govt. C. 12940, This protection is not limited to racial minorities. *Griggs v. Duke Power Co.* (1971) 401 US 424, 430-431, 91 S.Ct. 849, 853.

In this case Appellant asserts discrimination based on her race (White) and claims that she suffered an

adverse action (non-promotion) as a result of disparate treatment. "Disparate treatment is *intentional* discrimination against one or more persons on prohibited grounds; i.e,, treating similarly situated individuals differently in their employment because of a protected characteristic." *International Brotherhood of Teamsters v. United States* (1977) 431 US 234, 335-336, 97 S.Ct. 1843, 1854, fn. 15.

In a disparate treatment case, it must be shown that intentional discrimination was the "determinative factor" in the adverse employment action: "Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait . . . had a *determinative influence* on the outcome." *Hazen Paper Co. v. Biggins* (1993) 507 US 604, 610, 113 S.Ct. 1701, 1706 (emphasis added). See also, *Horsford v. Board of Trustees of Calif. State Univ.* (2005)132 CA4th 359, 377, 33 CR3d 644, 657 (Plaintiff's burden is "to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a *substantial* motivating factor in the employer's action toward the plaintiff.") (emphasis added).[9]

In the absence of direct evidence (such as employer admissions) disparate treatment may be proven by indirect or circumstantial evidence. In this case,

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[9] The Hearing Officer is indebted to the *California Practice Guide*: Employment Litigation Chapter 7 (Rutter Group, 2005) for its discussion of the current, applicable law under these statutes.

Appendix E

Appellant challenges the process by which the RA candidates were selected as discriminatory toward her as a White on the basis of the following: the composition of the Phase II interview panel; the questions asked in that interview; and the qualifications of the successful candidate relative to her own.

1. The selection process prior to Phase II.

The applicants were first assessed by means of a Manager's Appraisal Performance Plan (MAPP) by the ARA's supervisors, and the MAPP scores were used to place them in categories of priority: the top scores were placed in Band 1. The qualifying candidates were registered by the Department's HR office, and additional names were added to the registry as individual Appraisals of Promotability were received until the bulletin was suspended on October 4, 2005.[10]

David Waage, Personnel Officer III in HR (White) was the one who put this Phase I process and panel together. Phase I was not an examination, but a placement interview which provided an opportunity to get information about the candidates' suitability for the position All of the registered candidates were invited to participate in the interview, but it was not a requirement Candidates could be hired from the list without having interviewed.

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[10] Thus it appears that the June 9, late arrival of Jennifer Lopez to the certification list is not an issue; however, the fact that she was allowed to interview in the May 2005 Phase I interviews, remains unexplained.

Appendix E

2. The composition of the Phase II interview panel.

Amaryllis Watkins (African American) was in charge of forming a Phase II interview panel for the Wateridge RA position. Her assistant Aristeo Banico (Filipino) did the administrative work to form and coordinate the panel. The Department has described the Phase II interview as an effort to involve the stakeholders in the outcome: staff members from the Regional Office for which the RA was being selected, and consistent with the Department's "Points of Engagement" community outreach program, community partners involved in providing services for the children and families the Regional Office serves.

The Phase II interview panel consisted of six people, all African American: Deputy Director of Service Bureau 2 Amaryllis Watkins, who invited Executive Assistant to the Director of the Department Anita Shannon to participate; two community partners, one selected at random from the Wateridge Community Advisory Board, and one volunteer; two members of the Wateridge staff, a SCSW on the Service Planning Area Council and a CSW from the Staff Advisory Forum. Neither Watkins nor Banico knew the race of the community partners or the staff members on the panel until the June 14, 2005 interview, as they had only spoken by phone, and thus there is no evidence of Watkins having intentionally created an all-African American panel.

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3. The interview itself.

Appellant testified that she went into the interview having heard a lot of talk in the Department about the RA positions having been pre-selected on the basis of race (pro-African American and anti-Hispanic) before the official selection process began, but did not anticipate anti-White sentiment. However, she testified that the minute she walked in, Anita Shannon (African-American) walked out, and that this rattled her, as she understood Shannon's departure to be based on the fact that Appellant is White. Appellant also testified that she was "stunned" to see an all-Black interview panel.

Appellant testified that she was directed to a chair that put her with her back to Watkins, making her feel uncomfortable. Appellant and several other witnesses provided diagrams of the configuration of the interview room and the seating arrangement, and they fairly consistently drew and described the room as having an "L" shaped table with the candidate sifting inside the "L" with Watkins seated to their side.

Appellant testified that the questions were different in the Wateridge office than in the Lancaster Office RA interview (in which Shannon had participated) in that in the Lancaster interview, there were no questions about race or diversity. At Wateridge, she testified, there were questions about race-based communications, and race and the community. Appellant testified that one panelist said something about Black churches, and that she heard it as a racially charged question. She was

offended and *got the feeling* that they thought a White woman was not going to be able to manage a Black office. Vivian Harris asked her how she interacts with other ethnicities and staff, and she found this offensive because she understood the question asking her if she was biased or prejudiced, and thought Harris was asking, by the combination of tone, intimation and content about her ability to interact with Blacks.

Half way through the interview Appellant felt all of the questions were race-based. Appellant testified that she had pretty much shut down by that point, believing that the process was rigged, and the successful candidates had already been selected, and she went into monosyllabic answers.

I have fully and thoughtfully considered Appellant's testimony regarding the interview itself, as welt as the interview in the context of the record as a whole. Appellant's discomfort was no doubt genuine. However, the record simply does not support the conclusion that the interview was a piece or a product of discrimination, Ms. Shannon testified and told others at the time of the interview that she left because she was not feeling well.[11] Thus in the absence of any evidence to refute her explanation, I accept it and find no reason to conclude that departure was racially motivated. The fact that the

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[11] Shannon, the Executive Assistant to the Director, told some people that she had to leave to make a phone call. She testified that although she may have said that, and may have had a phone call to make, she recalls leaving because she did not feel well.

panel thus consisted of five African-Americans is not on this record, evidence of racial discrimination.

Nor do I find significance in the fact that Appellant sat in a position which put Watkins slightly behind her. The other candidates who testified, Hottenroth (White) and David Sanders (African-American) did not perceive the interview chair to place the candidate in an uncomfortable location, and certainly Appellant had the opportunity to adjust the location of the chair to a more comfortable vantage point had she wished to do so.

Appellant's description of questions about how she interacted with other ethnicities and her perception of what was being communicated there is troubling. The Department presented the written questions the candidates were asked in the Wateridge interview, and the sixth question is "how would you deal with the issues of cultural diversities?" Appellant points out that this was not a question in the Lancaster interview. However, cultural diversity is apparently not an issue in Lancaster in the same way as it is in Wateridge. The record shows that Wateridge serves Hispanic, African-American, various Asian, and Native American populations: cultural diversity is therefore an appropriate topic of discussion with a candidate for RA of that office.[12]

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[12] Appellant objects to the different regional offices having different interview questions and qualifications for the RA position. She points out that ERCP and Hotline are both 24 hour operations, and yet only the ERCP position required prior experience in that office. There is no basis for argument there:

(Cont'd)

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Appellant could not recall the words of the allegedly discriminatory questions she was asked regarding cultural diversity. By her own description, she was stunned and shocked the minute she walked in and found an all Black panel, and Shannon leaving. She heard questions, and perceived them as calling her character into question. She testified that she started feeling like the rumors were true and the selection process had been accomplished before the interviews began and that she simply "shut down" and became monosyllabic.

By way of contrast, Jennifer Hottenroth, the one other White candidate to interview for the Wateridge RA position had a very different experience. She was relieved when she entered the interview room and saw three people she knew and liked on the panel. She did not think about race in relation to the panel. She was asked the question about cultural diversity that is on the list of questions (DXO), and understood the question to ask about cultural diversity, meaning there are differences in culture, values, traditions and that as social workers they want to be aware and sensitive of

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regardless of their hours of operation, the two offices perform different functions and the Department has the right to determine the specific needs of each office in order to best serve its clients. Moreover, Appellant had ERCP experience and could not be adversely affected by that requirement. In the absence of clear and specific evidence of discriminatory impact of the differing requirements and questions, I do not find such differences relevant to the issues presented in this case.

those differences. She did not feel the question was directed at one particular group or another.

On this record and on the basis of Appellant's own description of the interview as well as the strong feelings Appellant showed while testifying about her experience there, it seems clear that Appellant's perception of the questions she was being asked, and of the intent behind those questions, was influenced by 1) rumors she had heard of pre-selection of the successful candidates, and 2) the great discomfort she felt upon entering the room, and finding an all African-American panel, one member of which was walking out. Her testimony makes it clear that she felt off balance and unable to give her best interview.

Nonetheless, the interviewers' notes of her answers to the questions (DXO, 1-6) make it clear that she was asked and responded to all seven of the set interview questions, and that she came across as experienced, intelligent, energetic, direct and "a nice lady." On the question about cultural diversity, her answer seems to have been along the lines that there is a need to be sensitive to the cultural differences in the community, and that she is very "up front" and does not have any problems in regard to racial differences. There is no indication in the interview notes that racially loaded questions were asked or answered.

After considering all of the evidence concerning Appellant's Wateridge interview, I do not find a basis for a factual finding that the interview itself was racially discriminatory.

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4. The Selection of Sanders for Wateridge.

The Department defends its selection of Sanders for the Wateridge RA position by evidence that Sanders was the best qualified candidate. When the employer raises that defense to discrimination, evidence that plaintiff has more education or experience than the person who got the job does not establish pretext unless plaintiffs credentials "are so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Millbrook v. IBP, Inc.* (7th Cir. 2002) 280 F3d 1169, 1180. That is not the case here.

Sanders was one of the five candidates the Phase II panel recommended for presentation to the Executive Team. The primary reason articulated by Amaryllis Watkins for not selecting Appellant as one of the candidates to be presented to the Executive Team, was that although Appellant came across in the interview as very intelligent, energetic and accomplished, what did not come through as much as it did with the other candidates was a strong commitment to work with children, families, and community. The panel was looking for talk about how to accomplish the goals of the Department, and a commitment to children and families. See also, DXO, 1-6.

In addition, Watkins selected Sanders as one of the candidates[13] to be presented to the Executive Team

[13] The five candidates selected for presentation to the Executive Team were David Sanders, Jennifer Hottenroth, (Cont'd)

because of his background: 30 or more years of experience in the Department: the fact that he had been an ARA in the Regions and in adoption, a budget analyst, had worked with the Probation Department and in the Independent Living Program, and had done a lot of community work with adolescents; and that he had a Ph.D. from USC in social work, Masters' degrees in social work and sociology. Watkins also testified that she selected him because in his interview he communicated a tremendous commitment to the children.

Sanders also had higher numbers. Although the Phase I interview was not a prerequisite for participating in the Phase II interview, both Appellant and Sanders were interviewed by the Phase I panel for the Wateridge office. That panel was made up of six members: two African-Americans; two Whites; one Hispanic and one Asian-Pacific. The Phase I panel unanimously rated Sanders as "Strongly Recommended" and rated Appellant as "Recommended." In addition, Sanders' MAPP score was a 4, with a numerical score of 100%, and Appellant's MAPP score was a 4, but with a numerical score of 95%. Sanders had 30 years of departmental experience; Appellant had 22.

Sanders has a B.A. from the University of Chicago in Sociology; a Masters degree in Sociology from CSU

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Cleo Robinson, Martha-Brisette Watson and a candidate with the last name of Blackburn. Hottenroth is White and the others are African American.

Los Angeles, in Social Work from CSU Long Beach; and a Ph.D. in Social Work from USC. Appellant has a BA from Antioch University in Arts; a Master's degree in Clinical Psychology from Antioch; a Ph.D. from Pacific Western University in Clinical Psychology, and a J.D. from the University of West Los Angeles.

Thus although Appellant is an intelligent, accomplished, well-educated individual with a great deal of experience which would be of great value in the Wateridge RA position, I cannot conclude that Appellant was more qualified than Sanders, nor that it would be impossible for a reasonable person, in the exercise of impartial judgment, to have chosen Sanders over the plaintiff for the job in question. I therefore do not find evidence of race discrimination in the selection of Sanders over Appellant.

5. The record as a whole.

After fully and thoughtfully considering *all* of relevant documentary evidence and witness testimony on the issue of race discrimination, I must conclude that Appellant has not produced "evidence that, taken as a whole, permits a rational inference that intentional discrimination was either a determinative or substantial motivating factor in the employer's actions toward the plaintiff." *Hazen Paper, supra*, 507 US at 610 and *Hosford, supra*, 132 CA4th at 377. Accordingly, I conclude that Appellant's appeal of her non-promotion under Rule 25 on her claim of race discrimination must be denied.

Appendix E

B. DID APPELLANT'S CHANGE IN SHIFT ARISE FROM RETALIATION FOR EXERCISE OF HER CIVIL SERVICE APPEAL RIGHTS AS ALLEGED IN HER MOVING PAPERS?

An employer's retaliation for an employee's having engaged in protected activity is an independently actionable claim under both Title VII and the FEHA. A plaintiffs prima facie retaliation case is established by proof of the following: plaintiff engaged in a protected activity (e.g. bringing a discrimination complaint); the employer subjected plaintiff to an adverse employment action; and a causal link exists between the protected activity and the employer's action.

Here, there is no dispute that on July 27, 2005 Appellant filed a request for a hearing on her non-promotion to the RA position with the Civil Service Commission alleging race discrimination in violation of Civil Service Commission Rule 25, and that this was protected activity. Similarly, the Department has not contested the conclusion that Appellant's involuntary shift change was an adverse employment action.[14]

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[14] Under FEHA, the employer's action must materially affect the terms, conditions or privileges of employment, *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 CA4th 1026, 1050-1052, and must be "both substantial and detrimental" to be actionable. *Thomas v. Department of Corrections* (2000) 77 CA4th 507, 512 "[A]dverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospect for advancement or promotion falls within reach of the

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The dispute at hand is thus limited to the issue of causation: was the graveyard assignment given in retaliation for Appellant having filed a Civil Service claim alleging race discrimination? This causal connection between the protected activity and the employer's adverse action is essential. *Farrell v. Planters Lifesavers Co.*, (3rd Cir. 2000) 206 F.3d 271, 279.

As a preliminary matter, causation may be established by an inference derived from circumstantial evidence such as the temporal proximity of the adverse action to the protected activity. Here, the graveyard assignment came soon after Appellant was granted a hearing on her discrimination claim. On or before September 21, 2005 the Department was aware that Appellant had filed a request for hearing with the Civil Service Commission on her discrimination complaint, and had been granted a hearing.[15] On September 27, 2005, six days after the Commission granted the hearing, Appellant was assigned to the graveyard shift. See DX23. This temporal proximity is close enough to be

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antidiscrimination provisions of [the FEHA]. *Hosford v. Board of Trustees of California State University* (2005) 132 CA4th 359, 375. See also, *Wyatt v. City* of Boston (1st Cir. 1994) 35 F.3d 13, 15-16 ("disadvantageous transfers or assignments" listed as an adverse action under Title VII).

[15] A Department representative was present at the Commission meeting, and Appellant testified that she filed the civil service discrimination complaint with Mattie Bryant in the Department's Human Resources office.

labeled "unusually suggestive" of a causal connection. See *Farrell, supra*, 206 F3d at 280.

At the same time, any inference of retaliatory intent derived from the mere proximity of the relevant actions may be eliminated by evidence indicating that there was no connection between the two. *Clark Co. School Dist. v. Breeden* (2001) 532 US 268, 272, 121 S.Ct. 1508, 1510. Once the case goes to trial, the plaintiff bears the burden of persuading the trier of fact that considering all of the evidence, it is more likely than not that the improper motive had a determinative effect on the action taken. *Woodson v. Scott Paper Co.* (3rd Cir. 1997) 109 F3d 913, 932.

It is essential to the causal link that the employer was aware that the plaintiff had engaged in the protected activity. *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982) 686 F.2d 793, 796. When an actual decision maker testifies that he was not aware of the plaintiff's past protected activity at the time of the adverse action, the causal link cannot be established. *Morgan v. Regents of the University of California* (2000) 88 CA4th 52, 73, 105 CR2d 652.

In this case, Lopez was the one who made the determination that an ARA on graveyard was important, and it was Lopez who decided that Appellant would be the ARA to fill that role. Lopez first wrote a September 15, 2005 memo to all three ARM asking for volunteers for the graveyard shift, but no one volunteered. Sometime during the week of September 19, 2005 Lopez

reported to Watkins her opinion that having an ARA on graveyard would serve the needs of the clients at the ERCP, and sought and obtained Watkins' approval to assign Appellant to the graveyard shift. The record thus establishes Lopez as the decision maker.

Lopez wrote Appellant a letter dated September 27, 2005 assigning her to graveyard. On September 29, 2005, Appellant wrote Lopez a letter protesting the shift change and alleging that it was made in retaliation, in part, for Appellant's Civil Service claim of race discrimination. The letter had a number of attachments, including Appellant's Request for Hearing on that discrimination claim. Lopez credibly testified that she first learned that Appellant had filed a discrimination claim when she read Appellant's September 29 letter.

Appellant presented testimony that it was big news in Watkins' bureau when the Commission granted a hearing in this case, and that she received calls from Watkins' and Lopez' secretaries saying that the notice had come in over the fax. However even if others were aware that a hearing had been granted, there is no evidence to show that Lopez — the decision maker— actually knew about Appellant's Civil Service discrimination claim prior to the issuance of the September 27 letter assigning Appellant to graveyard. Without that evidence, there is no causal connection. See *Mulhall v. Ashcroft* (6th Cir. 2002) 287 F2d 543, 551 (opportunity to learn of employee's protected activity not the same as knowledge).

Without causation, it does not matter how unprecedented, wrong or ineffectual unwise Lopez's restructuring plan for the ERCP may have been. Nor does it matter how logical or beneficial it may be. Without a causal connection between the protected action and the decision maker's adverse action in response, there is no retaliation. *Morgan, supra,* 88 CA4th at 70. Accordingly I conclude that Appellant's change in shift did not arise from retaliation for exercise of her civil service appeal rights as alleged in her moving papers.

C. DID THE DEPARTMENT PLACE THE APPELLANT ON FAMILY MEDICAL LEAVE OVER HER OBJECTION WITH RESULTING LOSS OF COMPENSATION AS ALLEGED IN HER PETITION?

Appellant objected to, but was approved for, FMLA leave. Guerrero initiated the approval process over her objection in order to best protect her interests at a time when a medical transfer had not yet been approved, and Worker's Compensation benefits had not yet begun. There was no improper motive involved in Guerrero's actions.

Nor did the approval of FMLA leave cause a loss of wages or accumulated time.[16] This is due to the simple

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[16] There was a disparity between what Lopez believed regarding Appellant's schedule and what Payroll understood to be Appellants schedule, for the period October 14 to (Cont'd)

fact that although FMLA leave was approved, Payroll never coded Appellant as using FLMA leave. Payroll Division did not change her work hours to four ten hour graveyard shifts because it did not have a signed form from Appellant requesting a change to a 4/40 schedule. Thus the Department never actually placed Appellant on FMLA leave, and continued to pay her as if she was working her regular daytime shift during the week.

CONCLUSION

After long and full consideration of all of the evidence presented, and in accordance with relevant law, I have concluded that although there are facts regarding the RA selection process which raise suspicions, Appellant has not met the ultimate burden of establishing intentional racial discrimination. My equally considered conclusion regarding the retaliation claim is that Appellant has not met the burden of proving the required causal link between her protected activity and the adverse action. There is simply no evidence to demonstrate that the decision maker was aware of Appellant's Civil Service claim prior to the imposition of the shift change. Finally, as to the issue of FMLA leave, the record shows that although FMLA leave was approved, it was never actualized by Payroll due to the lack of a signed form from Appellant. Thus in fact, the Department did not place Appellant on FMLA leave.

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December 14, 2005. That disparity yielded small overpayments and underpayments evidenced in the record for that period. Those errors should be remedied, but were not related to FMLA leave.

Appendix E

FINDINGS OF FACT

1. Appellant is an ARA with the Department.

2. Appellant identifies her race as White.

3. In December 2004 Appellant applied for promotion to the position of RA.

4. Appellant was interviewed by a racially diverse panel in Phase I of the RA selection process and was rated as "Recommended."

5. Stephen Sanders was interviewed by a racially diverse panel in Phase I of the RA selection process and was rated as "Strongly Recommended."

6. Appellant subsequently interviewed for that position at the Wateridge office.

7. The Wateridge interview panel consisted of six African Americans.

8. In addition to Amaryllis Watkins and Anita Shannon, the Wateridge interview panel was made up of two community partners and two Wateridge staff members who Amaryllis Watkins and/or Aristeo Banico spoke to only on the phone regarding their participation and as a result Watkins and Banico did not know the race of several of the members until the time of the interview.

9. Amaryllis Watkins did not intentionally create an interview panel at Wateridge without racial diversity.

10. The Wateridge RA has historically been African American.

11. Appellant was shaken by the departure of panelist Anita Shannon as Appellant entered the interview room.

12. Shannon's departure and non-participation was due to Shannon not feeling well.

13. Appellant was shaken when she saw an interview panel comprised of all African Americans.

14. One of the Wateridge interview questions asked how the candidate would handle issues of cultural diversity.

15. None of the Wateridge interview questions were racially discriminatory.

16. Appellant was well qualified for the Wateridge position.

17. Appellant was not chosen for the Wateridge RA position.

18. Stephen Sanders, the successful RA candidate for the Wateridge position, is African American.

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19. Stephen Sanders has equal or greater qualifications for the Wateridge RA position that does Appellant.

20. There is no evidence of intentional discrimination against Appellant on the basis of her race (White) in the record.

21. Appellant's non-appointment to the position of RA in the Wateridge office did not arise in material part from her race.

22. In September 2005, Appellant was assigned to the ERCP, working under newly promoted RA Jennifer Lopez.

23. Lopez began as the RA of the ERCP on August 9, 2005 and analyzed the operational needs of the office and looked for areas of improvement.

24. On or before September 15, 2005 Lopez had formed the opinion that an on-site ARA was needed on graveyard shift, and on September 15 asked for a volunteer from among her two swing shift ARAs and her one day shift ARA (Appellant).

25. The assignment of an ARA to a weekend graveyard shift was Lopez's decision made on or before September 15, 2005, and the result of her own analysis of the ERCP's operations and goals.

26. The assignment of an ARA to a weekend graveyard shift is within an RA's authority, if necessary to meet legitimate business concerns.

27. Sometime in the week of September 19, 2005 Lopez met with her supervisor, Amaryllis Watkins, and explained her plan to assign Appellant to graveyard; Watkins approved the assignment.

28. On September 21, 2005 Appellant was granted a hearing on her discrimination claim.

29. On September 27, 2005 Lopez sent Appellant a memo telling her that she was being assigned to Friday-Monday night graveyard shift effective October 17, 2005.

30. Lopez was not aware of Appellant having filed a July 27, 2005 Request for Hearing by the Civil Service Commission until September 29, 2005 when Appellant wrote her a letter attaching the Request for Hearing.

31. Appellant's change in shift did not arise from retaliation for exercise of her Civil Service appeal rights.

32. The Department did not place Appellant on Family Medical Leave.

Appendix E

CONCLUSIONS OF LAW

1. Appellant has not proven by a preponderance of the evidence that race was a determinative or substantial factor in her non-promotion to the position of RA, Wateridge Office, Department of Children and Family Services.

2. Appellant's non-appointment to the position of RA in the Wateridge office did not arise in material part from her race.

3. Appellant has not proven by a preponderance of the evidence that there was a causal relationship between her filing of a Civil Service case for race discrimination and her assignment to the weekend, graveyard shift at the ERCP.

4. Appellant's change in shift did not arise from retaliation for exercise of her Civil Service appeal rights.

5. Appellant has not proven by a preponderance of the evidence that she was involuntarily placed on FMLA leave to her financial detriment.

RECOMMENDATION

After fully and carefully reviewing all of the evidence in the light most favorable to Appellant, and in view of both the applicable law and common sense, I have concluded that neither intentional race discrimination

nor retaliation for filing such a Civil Service claim occurred, and further, that Appellant was not placed on FMLA leave, Accordingly, I respectfully recommend that Appellant's claims be denied.

Respectfully submitted,

s/ Terri Tucker
Terri Tucker
Hearing Officer

Dated: 6/13/06

APPENDIX F — ORDER OF THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DENYING PETITION FOR REHEARING DATED OCTOBER 1, 2008

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION 3

October 01, 2008

Diane Weissburg
4724 La Villa Marina
#J
Marina Del Rey, CA 90292

Diane Weissburg
v.
County of Los Angeles Civil Service Commission

B201432
Los Angeles County No. BS105855

THE COURT:

Petition for rehearing is denied.

cc: All Counsel

APPENDIX G — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED NOVEMBER 12, 2008

Court of Appeal, Second Appellate District,
Div. 3 – No. B201432

S166785

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DIANE B. WEISSBURG,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION,

Defendant and Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest and Respondent.

The petition for review is denied.

GEORGE
Chief Justice